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BLESSED BE THE TIES THAT BIND:
THE NEXUS BETWEEN NATIONALITY AND TERRITORY
Siegfried Wiessner

THE MISSISSIPPI ELECTION CODE OF 1986:
AN OVERVIEW
R. Andrew Taggart
John C. Henegan

CIVIL RICO AND INTELLECTUAL PROPERTY
AFTER *SEDIMA*
Emmette F. Hale, III

1986 MISSISSIPPI SUPREME COURT REVIEW

INDIVIDUAL RIGHTS AND GROUP WRONGS:
AN ALTERNATIVE APPROACH TO AFFIRMATIVE ACTION

RELEVANCE OF STATE OF THE ART EVIDENCE IN DESIGN DEFECT
ACTIONS UNDER SECTION 402A—POST-*TOLIVER*

THE GOVERNMENT CONTRACTOR DEFENSE:
AN ANALYSIS OF ITS APPLICATION BY THE COURTS

INDEX TO VOLUME 56

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VOLUME 56 DECEMBER 1986 NUMBER 3

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TABLE OF CONTENTS

ARTICLES

Blessed Be The Ties That Bind: The Nexus Between Nationality And Territory ..... *Siegfried Wiessner* 447

The Mississippi Election Code of 1986: An Overview ..... *R. Andrew Taggart* *John C. Henegan* 535

Civil RICO and Intellectual Property After *Sedima* ..... *Emmette F. Hale, III* 567

SUPREME COURT REVIEW

1986 Mississippi Supreme Court Review 641

COMMENTS

Individual Rights and Group Wrongs: An Alternative Approach to Affirmative Action 781

Relevance of State of the Art Evidence in Design Defect Actions under Section 402A—Post-*Toliver* 801

The Government Contractor Defense: An Analysis of its Application by the Courts 833

INDEX

Index to Volume 56 861

BLESSED BE THE TIES THAT BIND: THE NEXUS BETWEEN NATIONALITY AND TERRITORY

*Siegfried Wiessner**

People are, and remain, a cardinal base of power of national elites. In former times, they have been kept together by invocation and enforcement of group myths such as common ancestry, birth on common soil, or perpetual allegiance. The modern myth is the concept of nationality.

The rise of this concept is closely related to the ascent of the nation-state. Nevertheless, it was but in the aftermath of the French Revolution that it found its way into the statute books and other authoritative pronouncements of decision-makers of territorial communities. Since then, it has been a favorite object of interest for both scholars and wielders of power, not surprisingly, because it goes to the essence of the relationship between the individual and the state.

Battles over the meaning of nationality have raged since the birth of the concept. It has often been stated that nationality is a "purely formal concept,"[1] with no essential legal consequences flowing from it. If that were true, no distinction under customary international law between the treatment of foreigners and that of citizens would exist — be it in the area of international migration or in any other field of legally regulated behavior. The purpose of this article is to test this assumption with respect to the movement of persons across borders on a broad international and comparative legal basis — to find out whether the outcomes of the world's authoritative and controlling decision-making

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[1] Koessler, *"Subject", "Citizen", "National", and "Permanent Allegiance"*, 56 YALE L.J. 58, 70, 76 (1946-47). Silving, in 1956, reached the result that "in our times, more than ever before, there are no typical conditions or typical consequences defining 'nationality'." Silving, *Nationality in Comparative Law*, 5 AM. J. COMP. L. 411 (1956).

processes establish a definite link between nationality and home territory, and how that legal nexus is to be defined.

The problem is delimited in Part I of the inquiry, its methodology explained in Part II. The empirical phenomenon of people's movement across international borders is split into four legally relevant kinds of activities: the voluntary actions of entering or leaving a country, and the forced measures of expulsion and extradition. The following questions will be addressed, with special focus on potentially disparate treatment of foreigners and nationals: Is membership in a given territorial community the determining factor in deciding individual claims to access to territory (Part III)? Is it material in decisions regarding emigration (Part IV)? Is banishment outlawed (Part V)? And is extradition of nationals typically prohibited (Part VI)?

I. Focus of Inquiry: Nationality

Nationality, as a term of art, is barely two-hundred years old.[2] It has largely replaced the feudal concepts of allegiance[3] and subjecthood. In English and in the Romance languages, it soon took on two different meanings: a politico-legal one, denoting membership of a state, and a historico-biological one, referring to membership in a nation.[4] This inquiry focuses on the former meaning.

The "nature" of nationality has been the subject of enduring controversy throughout the last two centuries. Basically, two theories vie for recognition: (1) the *status* theory, and (2) the *relationship* theory. The status theory maintains that nationality is an original juridical situation independent of rights and duties arising from it.[5] The relationship theory views nationality

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[2] Its French matrix, *nationalité*, appeared, for the first time, in a dictionary in 1835. Koessler, *supra* note 1, at 58. The German term "Staatsangehörigkeit" was first used around the year 1800, "Staatsbürger" in 1770. R. Grawert, Staat und Staatsangehörigkeit 22 (1973).

[3] Allegiance has been defined as a "duplex et reciprocum ligamen, quia sicut subditus regi tenetur ad oboedientiam, ita rex subdito tenetur ad protectionem," so that "protectio trahit subjectionem et subjectio protectionem," 7 E. Coke, Reports 5 a, that is, a reciprocal relationship of loyalty and protection. *See* Salmond, *Citizenship and Allegiance*, 18 L.Q. Rev. 49-63 (1902).

[4] P. Weis, Nationality and Statelessness in International Law 3 (2nd ed. 1979).

[5] F. Florio, Nazionalità della nave e legge della bandiera 70-72, 91 (1957)(situa-

as a legal bond between an individual and his home state that encompasses, by necessity, specific rights and duties.[6] The latter one is prevalent in the United States.[7]

While some states refer to their membership status as "citizenship",[8] others use the term "nationality" or the *analogon* in

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zione giuridica originaria); Wengler, *Betrachtungen zum Begriff der Staatsangehörigkeit*, in FESTSCHRIFT WALTER SCHÄTZEL 545, 546 (1960)("Bereitschaftsstatus"); A. MAKAROV & H. VON MANGOLDT, DEUTSCHES STAATSANGEHÖRIGKEITSRECHT 1 (3rd ed. June 1985). In the United States Alexander Bickel found it "gratifying . . . that we live under a Constitution to which the concept of citizenship matters very little." A. BICKEL, THE MORALITY OF CONSENT 53-54 (1975).

[6] The specific legal consequences attached to the relationship between an individual and his home state vary among the authors. *See* M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 861-62 (1980):

> Individuals are said to be 'nationals' of a state when that state asserts, and the larger world community honors, claims to protect and control such individuals for all the comprehensive purposes of states, as contrasted with occasional particular exercises of competence under varying principles of jurisdiction.

Similarly, Wengler, *supra* note 5, at 548. P. WEIS, *supra* note 4, at 59, focuses on the right of diplomatic protection of, and the duty to admit, nationals. Lessing adds to this list the prohibition of banishment. H. LESSING, DAS RECHT DER STAATSANGEHÖRIGKEIT UND DIE ABERKENNUNG DER STAATSANGEHÖRIGKEIT ZU STRAF- UND SICHERUNGSZWECKEN 148 (1937).

For further theories, *see* A. MAKAROV, ALLGEMEINE LEHREN DES STAATSANGEHÖRIGKEITSRECHTS 28-29 (2nd ed. 1962).

[7] In particular, the *relationship* theory has been utilized by justices of the United States Supreme Court. In 1952, Justice Douglas stated that "American citizenship . . . carries obligations of allegiance as well as privileges and benefits." Kawakita v. United States, 343 U.S. 717, 734 (1952).

Chief Justice Warren characterized citizenship as "that status, which, alone, assures the full enjoyment of the precious rights conferred by our Constitution." Perez v. Brownell, 356 U.S. 44, 78 (1957)(Warren, C.J., dissenting).

Justice Brandeis once even stated that the loss of citizenship was equivalent to the loss of everything that made life worth living. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

Most recently, Justice Rehnquist added, in the context of interpreting the fourteenth amendment: "In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence." Sugarman v. Dougall, 413 U.S. 634, 652 (1972)(Rehnquist, J., dissenting).

[8] In the United States, the Constitution, with all its Amendments, only refers to the category of "citizenship". The Immigration and Nationality Act, however, introduces the concept of "non-citizen nationals", limited to the inhabitants of Western Samoa and Swains Island. 8 U.S.C. § 1101(a)(29). Following suit are other countries of the common law tradition. The USSR and other members of the Eastern bloc also prefer, internally, the foreign-language *analogon* of "citizenship". The same is true for Switzerland and

the foreign language.[9] In international law, the use of the term "nationality" is overwhelming.[10] Even those countries which call their members "citizens" prefer the term "nationals" when describing the members of other countries in their international treaties[11] and domestic law.[12] This predominant, generic use of the term "nationality" justifies its utilization for the purposes of this inquiry.

Nationality, like any other legal concept, is a tool lawyers, judges and other decision-makers use in order to determine what ought to be done in a given situation.[13] It is only a means to a social end, not an end in itself.[14] Thus, inquiry focuses on the question: Why do decision-makers use a particular legal concept? In reference to nationality: Why do territorial communities confer or withdraw this particular status of membership?, and Why do individuals strive to maintain or to lose it? This functional approach may not overlook the functional conse-

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Austria.

[9] The most notable examples of states using the term "nationality" or its foreign-language *analogon* are: France and other francophone countries; the Federal Republic of Germany and other countries of the civil law tradition.

[10] Multilateral international conventions almost exclusively use the term "nationality". For a sample of those conventions that use the term in their titles, see Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, December 4, 1930, 179 L.N.T.S. 89; the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, December 4, 1930, 178 L.N.T.S. 227; the Montevideo Convention on the Nationality of Women, December 26, 1933, T.S. No. 875; 6 HUDSON, INT'L LEGISLATION 589, 593; the United Nations Convention on the Nationality of Married Women, February 20, 1957, 309 U.N.T.S. 65; and the Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, 634 U.N.T.S. 221.

[11] United States treaty practice is an indicator. First, the United States Department of State treaty index lists the pertinent agreements under "Nationality". TREATIES IN FORCE. A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1986 277 (1986). Under the term "Citizenship", there is only a cross-reference to "Nationality". Examples of bilateral treaties using "nationals" terminology and its derivations include Convention on the Rights of the United States and of its Nationals in Iraq, January 1, 1930, 2 U.S.T. 998, T.S. No. 835; Consular Treaties with Austria of June 19, 1928, T.S. No. 838, 118 L.N.T.S. 242, and the United Kingdom of June 6, 1951, 165 U.N.T.S. 121. In conformity are the international treaty practices of Switzerland and Austria.

[12] *See* the 1976 Immigration and Nationality Act, 8 U.S.C. § 1101 and the 1981 British Nationality Act.

[13] Cook, 3 PROC. AM. L. INST 226, 227 (1925).

[14] 1 R. VON JHERING, DER ZWECK IM RECHT 5 (2nd ed. 1884).

quences attached to possession of nationality. It must take into account the full array of decisions, both under domestic and international law, that are bound together in the one act of conferment or withdrawal of nationality. These implied consequences are essential features of membership in a particular community. For this reason, nationality is to be defined as an *aggregate status*, composed of the respective consequences attached to it by international and domestic law.

These consequences may change on both the domestic and the international plane. In fact, it has been contended that the legal content of nationality is not nearly constant since it changes with almost every new enactment.[15] Most statutes, however, do not apply nationality as a differentiating criterion. If nationality makes a difference in the treatment of certain fact patterns, these differentiations usually have grown and matured over a long time, have been solidified by constant practice, and have become part of the engrained legal culture of a given community. Change of such features is, thus, difficult to effect. Even across borders and across legal traditions, such differentiating features may be common. As an experienced student of the area tells us, "the concepts of nationality under municipal law have a great many common features and they show a large measure of conformity."[16] If there are such common functions, they form the basis for a *transnational concept of nationality* that establishes a crucial starting point for communication among lawyers from different legal systems. Further, in addition to providing common conceptual ground that may form the basis for scholarly insights in the comparative study of law, a transnational, functional concept of nationality may also prove useful for the drafting and interpretation of international treaties and domestic laws that utilize this term. It can be used to identify the persons who are to be considered "nationals" of a particular state if that state has failed to enact legislation to that effect. Such identification may be necessary for the purposes of customary international law (e.g., with respect to which persons is a state entitled to exercise its right of diplomatic protection?), interna-

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[15] G. JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE 118 (2nd ed. 1905).
[16] P. WEIS, *supra* note 4, at 239.

tional conventions (which may accord certain special treatment to nationals), or the conflicts laws of other states (which may determine the applicable law according to the personal jurisdiction of the individual involved), to name but a few of the legal prescriptions involved.

The attribute of nationality is a critical factor in a variety of factual constellations, ranging, *inter alia*, from voting rights and diplomatic protection to access to certain professions and the common law crime of treason. The purpose of this study is to focus on one particular potential function of nationality, probably the most crucial one: the specific legal ties of a national to his or her home territory. For in the twentieth century, it is only within the home state that man may enjoy the full array of rights connected with that status; only there does man also bear all the burdens of citizenship.

This approach presupposes a broad comparative analysis of past legal trends in decision that condition the expectations of humankind as to what is right or wrong in a particular set of facts and claims.

II. Method of Inquiry

A successful comparative analysis must observe three principles: (1) it must be empirical and functional; (2) it must be sufficiently general; and (3) it must be representative.

Domestic legal systems are hopelessly diverse in structure and terminology. A transnational framework of inquiry, thus, has to deliberately avoid the terminological codes, procedures and institutions germane to particular legal systems. It has to start from the social function of the legal terms utilized to designate the concrete societal problems addressed by the respective decision-making processes. Thus the approach has to be *empirical* and *functional*, not normative. In the case at hand, one must analyze all the factual constellations and social problems in which recourse to the bond of nationality was determinative of the outcome the authoritative and effective legal solution[17]. In

[17] Authority and control are essential to the concept of law. McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 Am. J. Int'l L. 1, 9 (1959); Reisman, *A Theory About Law from the Policy Perspective*, Law and Policy

the context of movement across borders this means addressing, and investigating, the distinct areas of access to territory, voluntary departure, involuntary departure, and extradition.

The guiding principle of functionality is joined by the principle of *generality*. That means that only the full membership category in any given community is analyzed; i.e., in the United Kingdom, the "British citizen",[18] and in the Federal Republic of Germany, the "status as a German".[19] Special categories are excluded, be it in the area of nationals or in the area of aliens. Privileges accorded to these special groups, e.g., refugees, Common Market citizens, or permanent resident aliens in the U.S., would only cloud the outcome of an analysis that is focusing on the determination of the general function of nationality. The groups whose legal treatment is to be compared are, therefore, the full-status nationals as opposed to the unprivileged, "general" aliens.

It is crucial to limit the number of legal systems analyzed in detail. This is not only necessary in order not to overburden the individual researcher, but also to eliminate protracted, fruitless searches at an early stage. In our case it is possible, via careful selection of the legal systems analyzed, to determine common functions of nationality on a preliminary *representative* basis. If there are such common consequences, they may be tested, in a broader sample, against a wider set of state practice. The validity of this analysis depends upon a considered selection of these representative systems. In the context of people's movement across borders the major legal traditions of the world should be represented as well as the diversity of community attitudes towards migration.

The major legal "families" of the world include the civil law tradition, the common law tradition, and socialist legal systems.[20]

75, 88-89 (D. Weisstub ed. 1976).

[18] 1981 British Nationality Act.

[19] As established by the 1949 Basic Law, the West German constitution. *Grundgesetz* art. 116 (1) (W. Ger.).

[20] R. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 22 (7th ed. 1978), refers to "trois groupes de droits principaux: famille romano-germanique, famille de common law, famille des droits socialistes." There are other legal traditions, including those of

Common law tradition may be characterized, in its essence, by inductive reasoning and the ability of the judge to assume the role of creative decision-maker. For the purposes of this analysis the legal system of the United States of America is chosen as its representative over the parent system of the United Kingdom, basically for two reasons: (1) the United States is conceived of historically as the major immigration country, (2) it has surpassed the United Kingdom in terms of military and economic power, and thus enjoys a greater degree of influence on the global decision-making process.

The legal systems of France and Germany are equally suitable as representative of the civil law tradition, which traces its origin to Roman law and is characterized by systematic, allegedly all-encompassing, codifications.[21] The author chooses the Federal Republic of Germany primarily because of his familiarity with its legal and social system, and also because of this community's *de facto* (not *de jure*) status as an immigration country.[22]

The USSR is the "motherland" of the socialist camp, and as such, shaped the legal "superstructure" of the Eastern bloc to a considerable extent. As one of the two superpowers, it wields considerable influence in world affairs. Of all the states compared it would probably be the least attractive for immigration.[23]

African tribes, the Far East, Islamic, Hindu, and Hebrew law. Often superseded by the legal cultures of the colonial powers in both style and content, these indigenous sets of substantive prescriptions and procedural arrangements sometimes continue to govern the personal sphere, in particular family and inheritance matters of the peoples. With the possible future exception of Islamic law, they never reached the formative influence of the three dominant legal traditions.

[21] R. SCHLESINGER, COMPARATIVE LAW 238 (4th ed. 1980); J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 69 (1978).

[22] Although the Government maintains that the Federal Republic does not encourage immigration and naturalization, in September, 1983, this community counted 4.52 million resident foreigners, many of whom had resided in the F.R.G. for decades. INFORMATIONEN ZUR POLITISCHEN BILDUNG, No. 201, at 1 (1984). This number equals 7.2% of the German population, and the absolute number of all permanent resident aliens in the U.S. in 1980 (4.5 million). THE STATESMAN'S YEAR-BOOK 1983-1984 1378 (1983).

[23] In 1979, only 351,000 foreign citizens were "temporarily resident" in the USSR. Boguslawski, *Bericht über die Rechtsstellung der Ausländer in der UdSSR*, at 5 (1985). This number does not include tourists. In 1975, for instance, the USSR counted 3.69 million foreign visitors. THE STATESMAN'S YEAR-BOOK 1983-1984 1232 (1983).

As stated above, this analysis is structured into the four "nationality-sensitive" areas of movement of persons across borders: (a) access to territory, (b) voluntary departure, (c) involuntary departure, and (d) extradition. The analysis of past trends in decision and conditioning factors starts out with a historical overview, leading into the process of international legal decision-making. In reference to the latter topic, the principle of generality applied in this analysis requires the disregard of treaty law to the extent that it does not codify or evidence general international law, in particular, customary international law. Specifically, the international human rights conventions have to be matched carefully with existing state practice in order to determine whether their provisions have matured into the status of customary law. A detailed analysis of the representative domestic legal systems follows the inquiry into applicable international law. If both the analysis of international law and of representative domestic systems yield common features of differential treatment, the scope of inquiry is broadened, and the results are tested against the practice of all relevant states. The outcome of this inquiry may be the formulation of common transnational features of nationality that determine the legal nexus between nationality and territory at the end of the twentieth century.

III. Access to Territory

The "right" to enter one's home country is probably a common expectation of man. To what extent this assumption withstands legal scrutiny will be explored in this section.

A. The Treatment of Aliens

There have been times and places in history when human beings, without distinction, have been given the right to migrate. The Germanic principle of freedom of migration, for example, was intended to convey the idea that Germans were not slaves attached to the soil, not "certo solo adscriptitii", and thus they were free to change their sovereign and territory at will.[24] Section 24 of the Augsburg Treaty of Religious Peace of 1555

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[24] R. Grawert, *supra* note 2, at 94.

granted individuals the right to emigrate from territories reigned by rulers with different beliefs. This right became the basis of a general legal principle of emigration, though subsequently the import of this principle was undermined by heavy curbs on immigration. For example, the Holy Roman Empire of the German Nation and Switzerland forbade access to their territories by subjects of foreign princes, in particular, by villain peasants.[25] The Germanic custom of freedom of migration thus was soon replaced by harsh restrictions.

The second legal recognition of freedom to travel was to be found in the English Magna Carta of 1215. Section 41, in its original version, granted merchants, who had not previously been excluded, a right to enter the kingdom and to freely travel within its territory "in accordance with ancient and lawful customs."[26] Section 42 stated:

> It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom; excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation of war against us, and merchants who shall be treated as it is said above.

In later editions of the Magna Carta, this general right of entry and return to the kingdom was omitted. It remained, however, guaranteed to the merchants.[27] The grant was not formally repealed until 1969.[28]

The relevance of this provision of the Magna Carta to the development of the Anglo-American rights and liberties is highlighted in a 1958 decision of the United States Supreme Court.

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[25] Dürig notes a peculiar dialectic of migration, an antithetical tension between emigration and immigration: The more liberally emigration is granted by the community that is left, the greater the tendency of accepting communities to restrict immigration. Dürig, *Freizügigkeit*, in 2 DIE GRUNDRECHTE 507 (F. Neumann, H. Nipperdey & U. Scheuner eds. 1954).

[26] R. PLENDER, INTERNATIONAL MIGRATION LAW 40 (1972).

[27] Aybay, *The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement*, 1 COMP. L.Y.B. 121, 130-31 (1977).

[28] Statute Law (Repeals) Act 1969, sec. 1, schedule 1, part 1.

In *Kent v. Dulles*,[29] Justice Douglas justified a citizen's right to travel as a "liberty" recognized as early as the Magna Carta.[30] Going beyond this interpretation, an English author in 1890 even inferred from this provision of the Magna Carta that the British Crown had no right to deny entry to *aliens* or to expel them.[31]

The common law developed in a different direction. Although an alien did not commit a punishable offense by entering English territory without the King's authorization, he could be denied admission anytime according to the free and unrestricted discretion of the King.[32] The Tudors, in particular Queen Elizabeth I, invoked this power against the mass influxes of the Flemish, Irish and Huguenots.[33] In contrast, the refugees of that time were most welcome in another country: the newly-independent United States of America. Its first one-hundred years were marked by a policy of "open frontier", the encouragement of virtually unlimited immigration due to geographic factors and economic and demographic needs.[34]

Transcending the boundaries of governmental pragmatism, theoreticians of the developing field of "international law" postulated a human right to travel, a so-called *jus intergens*, based on natural law — sometimes for rather transparent reasons. Francisco de Vitoria justified the incursion of the Spaniards into the territories of the Indians in the Americas this way:

> I will now speak of the lawful and adequate titles whereby the Indians might have come under the sway of the Spaniards. The first title to be named is that of natural society and fellowship. And hereon let my first conclusion be: The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives

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[29] 357 U.S. 116 (1958).

[30] *Id.* at 125.

[31] *See* Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. Rev. 27, 29 (1890)(no prerogative of the Crown to exclude or to expel aliens).

[32] *See* W. Blackstone, Commentaries on the Laws of England 259 (1765)(rejecting the Magna Carta argument).

[33] R. Plender, *supra* note 26, at 40.

[34] Bernard, *A History of U.S. Immigration Policy*, in R. Easterlin, D. Ward, W. Bernard & R. Ueda, Immigration 75 (1982).

may not prevent them. Proof of this may in the first place be derived from the law of nations (jus gentium), which is either natural law or is derived from natural law. . . .

Secondly, it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. . . .

Thirdly, everything is lawful which is not prohibited or which is not injurious or hurtful to others in some other way. But (so we suppose) the travel of the Spaniards does no injury or harm to the natives. Therefore it is lawful.

Fourthly, it would not be lawful for the French to prevent the Spanish from traveling or even living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury. . . .

Further, fifthly, banishment is one of the capital forms of punishment. Therefore it is unlawful to banish strangers who have committed no fault.

Further, sixthly, to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war. Inasmuch then, as the Indians are not making a just war on the Spaniards (it being assumed that the Spaniards are doing no harm), it is not lawful for them to keep the Spaniards away from their territory.

Further, seventhly, there is the Poet's verse: ". . . [W]hat country is barbarous enough to allow this usage? We are driven off from the hospitality of its shore."

Also, eighthly, "Every animal loveth its kind." (*Ecclesiasticus*, ch. 15). Therefore, it appears that friendship among men exists by natural law and it is against nature to shun the society of harmless folk.

Also, ninethly, there is the passage (*St. Matthew*, ch. 25); "I was a stranger and ye took me not in." Hence, as the reception of strangers seems to be by natural law, that judgment of Christ will be pronounced with universal application.

Tenthly, "by natural law running water and the sea are common to all, so are rivers and harbors, and by the law of nations ships from all parts may be moored there" (*Inst.*, 2, 1); and on the same principle they are public things. Therefore it is not lawful to keep any one from them. . . .

Also, eleventhly, these very persons admit all other barbarians from all parts. Therefore, it would be doing a wrong, if they were not to admit the Spaniards.

Also, twelfthly, if it were not lawful for the Spaniards to

> travel among them, this would be either by natural law or by divine law or by human law. Now, it is certainly lawful by natural and by divine law. And if there were any human law which without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law.
>
> Thirteenthly, either the Spaniards are subjects of the Indians or they are not. If they are not, then the Indians can not keep them away. If they are, the Indians ought to treat them well.
>
> Also, fourteenthly, the Spaniards are the neighbors of the barbarians, as appears from the Gospel parable of the Samaritan (*St. Luke*, ch. 10). But they are bound to love their neighbors as themselves (*St. Matthew*, ch. 22). Therefore they may not keep them away from their country without cause: "When it is said 'Love thy neighbor' it is clear that every man is our neighbor" (St. Augustine's *De doctrina Christiana*).

This somewhat lengthy excerpt from *De Indis*, the classic of international law of 1539,[35] demonstrates, again, that power politics under the garment of human rights is no invention of our time, that even great authors are prone to redundancy, and that some arguments are perennial. Colonial Spain had to justify its genocidal policy of conquest,[36] and it did so under the cover of the law and with the blessing of the Church.[37]

The idea of a natural right to "peaceful" ingress into foreign

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[35] F. DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES, §§ 386-388, at 151-52 (ed. E. Nys, trans. Bate 1917).

[36] A. HELPS, THE SPANISH CONQUEST IN AMERICA AND ITS RELATION TO THE HISTORY OF SLAVERY AND TO THE GOVERNMENT OF COLONIES 264-67 (1900).

[37] Royal Councils in Spain felt obligated to demonstrate the legal validity of their claims to the [West] "Indies", to defend the morality of the subjection by force of the rather defenseless Indios, and to refer to the Christian duty to convert the unfaithful. The legal basis for Iberian rule was found in bulls enunciated by Pope Alexander VI between May and September 1492. The monarchs of Castile and Portugal put their last doubts as to the morality and legality of the butchering of thousands of indigenous people to rest when they ordered their conquistadors to read out to the Indios to be subjugated, prior to the commencement of hostilities against them, a so-called *requerimiento*, a message of the King. This message requested the Indians to submit themselves and to adopt the Catholic faith. The King based the legitimacy of this request on his authorization by the Pope who, himself, represented the highest authority, God. K. KARST & K. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 31-33 (1975).

territory,[38] tethered to the warning that any denial of access would be considered an act of war, gained only limited applause by other scholars. Hugo Grotius viewed foreigners' rights of access restricted to rights of transit and temporary sojourn. "To those who pass through a country, by water or by land, it ought to be permissible to sojourn for a time, for the sake of health, or for any other good reason; for this also finds place among the advantages which involve no detriment."[39]

One century later, in another classic of international law, Emer de Vattel stated as a tenet of international law that:

> A sovereign may prohibit entrance into his territory, either to all foreigners in general or to certain persons, or in certain cases or for certain particular purposes, according as the welfare of the State may require. There is full justification for so doing in the rights of ownership and sovereignty; every one is obliged to respect the prohibition, and those who presume to violate it incur the penalties fixed to render it effective.[40]

How did this turnaround from nearly utmost individual freedom of migration to utmost state control over access to territory come about? Aybay suggests that the absolute monarchies of that time viewed travel across state borders, immigration and emigration as an inherent menace to their rule, and thus undesirable. The power elites also feared the influx of huge masses of persons who had lost their homes by the great wars of the time.[41]

In order to better control these influxes, but also with a

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[38] Taken literally, Vitoria's theory would justify actions such as the "Green March" into the Western Sahara, threatened by King Hassan of Morocco in 1975. *See* Weiner, *The Green March in Historical Perspective*, 33 MIDDLE EAST J. 20 (1979); Note, *The March on the Spanish Sahara: A Test of International Law*, 6 DENVER J. INT'L L. & POL'Y 95 (1976).

[39] H. GROTIUS, DE JURE BELLI AC PACIS bk. 2, ch. XIV, at 201 (trans. F. Kelsey 1925).

[40] E. DE VATTEL, LE DROIT DES GENS, bk. II, ch. VII, § 94, at 142 (1758, trans. C. Fenwick 1916). Nafziger interprets less clear formulations found elsewhere in this book as recognition, by Vattel, of a qualified right of admission by certain groups of foreigners, e.g. refugees or exiled persons. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 811-15 (1983). Those formulations, however, indicate only Vattel's recommendations as to how the law should be, not the *lex lata* of his time.

[41] *See* Aybay, *supra* note 27, at 122.

view toward restraining the surging tide of emigration, travel restrictions were instituted. Their main instrument was the passport. The authorities of the Roman Empire had been the first to use this document: in this official piece of paper, they promised their own citizens protection abroad, and they asked the rulers of foreign territory to grant Roman citizens a safe journey through their lands.[42] At the end of the 18th century, the passport was a mandatory travel document throughout Europe with the exception of England. Leaders of the French Revolution viewed the passport as an instrument of despotism and a document of oppression. It was abolished, and the Constitution of 1791 proclaimed the unrestricted right to travel as a natural, inalienable human right. This freedom, however, lasted barely half a year: a series of enactments passed by the National Assembly between the years of 1792 and 1795 forbade all persons without a passport to travel within France or to enter or leave the country. Driving forces behind this abrupt change were the surging tide of political emigration, the desertion of soldiers and their flight abroad, and also an "invasion" of beggars.[43]

In the late nineteenth century, and especially after the turn of the century, state control over individual movement via passports was relaxed.[44] The outbreak of the First World War, however, signaled the return of the general regime of migration control — a situation persisting to the present day.[45] Thus it does not come as a surprise that the last doctrinal statements about an individual right to enter were made at the beginning of this

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[42] Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, U.N. Doc. E/CN.4/Sub.2/220/Rev. 1, at 12 (1963).

[43] The restrictions were officially justified by references to "needs of national security." Reale, *Le Problème des Passeports*, in IV RECUEIL DES COURS 101-03 (1934); Sorapure, *The Passport*, 41 CORNELL L. REV. 284 (1956).

[44] In 1913, Georges Duhamel completed a tour of Europe by foot, with an old visiting-card in his rucksack as his only proof of identity. Duverger & Sfez, *Die staatsbürgerlichen Freiheitsrechte in Frankreich und in der Union Française*, in: 1 DIE GRUNDRECHTE 578 (K. Bettermann, F. Neumann & H. Nipperdey eds. 1967). See also the description of the "golden" time of travel throughout Europe without a passport prior to World War I in Stefan Zweig's 1941 autobiography DIE WELT VON GESTERN.

[45] D. TURACK, THE PASSPORT IN INTERNATIONAL LAW (1972); Reale, *The Passport Question*, 9 FOREIGN AFFAIRS 506 (1931).

century.[46]

1. United States of America

The prevalent trend in decision, dominating the practice of nation-states today, was set by the Supreme Court of a country that had just abandoned its policy of an "open door" for immigrants and enacted a general immigration law: the United States of America. Justice Gray stated, in *Nishimura v. United States*[47]:

> It is an accepted maxim of International Law that every sovereign has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[48]

In *Fong Yue Ting v. United States*[49], the Court went one step further and declared a state's "right to exclude or to expel *all* aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."[50]

The backdrop of these decisions was a widespread aversion to Asians at that time, particularly against Chinese laborers.[51]

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[48] Fauchille, Anzilotti and von Liszt are the authors of these statements. Fauchille based his claim on his view of an interdependent international system that was built upon the economic solidarity of peoples. P. FAUCHILLE, I. TRAITÉ DE DROIT INTERNATIONAL PUBLIC 889, 892 (8th ed. 1922). See also F. VON LISZT, DAS VÖLKERRECHT SYSTEMATISCH DARGESTELLT § 25, at 185 (2nd ed. 1902), and Anzilotti, *La Responsabilité Internationale des Etats a Raison des Dommages Soufferts par des Etrangers*, 13 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 18 (1906), all with further references. Most recently, Nafziger stated more cautiously that "a state has a qualified duty to admit aliens when they pose no serious danger to its public safety, security, general welfare, or essential institutions." Nafziger, *supra* note 40, at 847. The use of the term "qualified duty" makes the statement (intentionally?) unclear. Is there an obligation by a state to admit foreigners if the stated conditions are present? What are the "qualifications" of that duty? Nafziger's article does not answer these questions.

[47] 142 U.S. 651 (1892).

[48] *Id.* at 659.

[49] 149 U.S. 698 (1893).

[50] *Id.* at 711 (emphasis added).

[51] Higham, *American Immigration Policy in Historical Perspective*, 21 L. & CONTEMP. PROBS. 213, 216-17 (1956). As to the situation of Chinese workers in California, in

This also underlies the so-called Chinese Exclusion Act of 1882[52] which denied Chinese workers access to U.S. territory for ten years.[53] The U.S. Supreme Court upheld this statute on the basis of this same doctrine of a state's territorial sovereignty.[54] Under U.S. law, the government's discretion to admit, or exclude, aliens has taken priority over citizens' claims, under the first amendment or other provisions of the Bill of Rights, to invite, listen to, or have an intellectual discourse with particular foreigners.[55] This discretionary decision is not subject to judicial review.[56]

The principle of general discretion of states in admitting aliens to their territories is reflected in the practice and *opinio juris* of the other nation-states.[57] Justice Gray's statement of 1892 still holds true: the freedom of states to control their borders is a living rule of customary international law.[58] It is implied in the worldwide practice of immigration control via visa and residence or travel permit requirements.

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particular, see Eaves, *California Legislation for the Exclusion and the Regulation of the Chinese, 1867-1880*, in 2 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN ECONOMICS 134 (1910).

[52] Act of May 6, 1882, ch. 126, 22 Stat. 58.

[53] This period was extended for another ten years in 1892 (Act of May 5, 1892, Ch. 60, 27 Stat. 25), and subsequently extended indefinitely in 1902. R. EASTERLIN, D. WARD, W. BERNARD & R. UEDA, IMMIGRATION 93 (1982). In 1943, the restrictions imposed by the Chinese Exclusion Act were lifted. T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 34 (1985).

[54] Chinese Exclusion Case, 130 U.S. 581 (1889). *See* Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1587, 1588 (1959). This theory was reaffirmed in Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[55] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[56] Peña v. Kissinger, 409 F. Supp. 1182, 1185 (S.D.N.Y. 1976). The Supreme Court, however, has ruled recently that the due process clause is applicable to cases involving the return of permanent resident aliens. In these cases, the possible infringement upon a status protected by law is at issue, not the granting of a privilege. Landon v. Plasencia, 459 U.S. 21 (1982).

[57] *See* R. PLENDER, *supra* note 26, at 298 (broad overview of domestic statutes on immigration).

[58] In 1927, the Supreme Administrative Court of Poland expressly referred to the discretion of states in admitting aliens as a rule of customary international law. Soltanow v. (Polish) Ministry of Foreign Affairs, 4 ANN. DIG. PUB. INT'L L. CASES 328 (1931).

2. Federal Republic of Germany

In conformity with this practice, § 2 (1) of the Aliens Act of April 28, 1965 of the Federal Republic of Germany prescribes:

> Aliens who wish to enter the area of application of this Act, and who wish to sojourn there, need a residence permit. A residence permit may only be issued if the alien's presence does not adversely affect the interests of the Federal Republic of Germany.[59]

3. Union of Soviet Socialist Republics

Entry into the Soviet Union is subject to official authorization as well. It may be denied for reasons enunciated in laws of the Union. Those reasons are listed broadly in Article 24 of the Law on the Legal Status of Foreign Citizens in the USSR of June 24, 1981:

> Foreign citizens may enter the USSR under valid foreign passports or documents replacing them with an authorization issued by competent Soviet agencies.
>
> Entry of a foreign citizen into the USSR may not be authorized:
>
> (1) in the interests of ensuring state security or protection of public order;
>
> (2) if this is necessary in order to protect the rights and legal interests of USSR citizens and other persons;
>
> (3) if during a preceding stay in the USSR the fact of a violation of legislation on the legal status of foreign citizens in the USSR, or customs, currency or other Soviet legislation has been established;
>
> (4) if when petitioning for entry he has communicated false information about himself or has not submitted the necessary documents;
>
> (5) on other grounds established by USSR legislation.[60]

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[59] Ausländergesetz, 1965 Bundesgesetzblatt [BGBl] I 353 (author's translation).

[60] *Zakon O Pravovom Polozhenii Inostrannych Grazhdan v SSSR* [Law on the Legal Status of Foreign Citizens in the USSR], June 24, 1981, VED. VERKH. SOV. SSSR 1981, no. 26, item 836. English translation in II-9 COLLECTED LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE CONSTITUENT UNION REPUBLICS, Art. 24, at 8, 9 (W. Butler ed. 1985)[hereinafter USSR LEGISLATION]. This statute became effective January

Details on the entry and sojourn of foreigners in the USSR, in particular on the procedure of registration of foreign passports, are to be found in the Rules for the Sojourn of Foreign Citizens in the USSR of May 10, 1984.[61]

Another author could formulate most recently that "a state has a qualified duty to admit aliens when they pose no serious danger to its public safety, security, general welfare, or essential institutions."[62] Such a conclusion seems to be at variance with both the laws on the books and the "law in action" of modern nation-states. Nafziger refers, broadly, to Plender's analysis of state practice,[63] but does not himself conduct such a review. Plender himself expressly refuses to draw this conclusion. He denies the existence of a customary international right of access by aliens and a concomitant legal obligation of states.[64] In addition, Nafziger's concept of a "qualified duty" remains unclear.[65]

Scholarly opinion today is virtually unanimous in affirming the principal freedom of states to grant or deny aliens access to their territories.[66] There are exceptions, some limited legal obligations to admit certain foreigners. These exceptions, however, are not based on customary international law, but on domestic laws or special international agreements. They refer to aliens with "well-deserved" rights of residence,[67] diplomats and con-

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1, 1982. Paragraph 5 of Article 24 makes clear that this list of grounds for denial is not exhaustive. *See also* Pusylewitsch, Art. 37 Annot. 19, in 1 HANDBUCH DER SOWJETVERFASSUNG, at 474 (M. Fincke ed. 1983).

[61] SP SSSR 1984, no. 21, item 113, effective as of July 1, 1984; English translation in 23 INT'L LEGAL MAT. 1425 (1984). *See also Rules for Transit Passage of Foreign Citizens Across the Territory of the USSR*, 23 INT'L LEGAL MAT. 1432 (1984)(rules promulgated July 1, 1984). These rules apply to foreigners, apparently replacing the *Regulations Governing Entry Into and Exit From the Union of Soviet Socialist Republics* promulgated September 22, 1970 and first communicated to the United Nations in 1974, U.N. Doc. E/CN.4/1098/Add.25 (Jan. 9, 1974). This has been made clear in Article 27 of the August 28, 1986 amendments to that statute. See the English translation in 26 INT'L LEGAL MAT. 425, at 431.

[62] Nafziger, *supra* note 40, at 847.

[63] *Id.* at 834.

[64] R. PLENDER, *supra* note 26, at 94.

[65] *See supra* note 46.

[66] J. BRIERLY, THE LAW OF NATIONS 276 (6th ed. 1967); 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 717 (1942); 1 L. OPPENHEIM & H. LAUTERPACHT, INTERNATIONAL LAW 675 (8th ed. 1961).

[67] Compare the status of a "permanent resident alien" in the United States with the

suls, troops stationed abroad, and victims of catastrophes.[68]

Political refugees are also only protected by special treaties and/or domestic law. In contrast to some assertions in scholarly writings,[69] the "human right of asylum" has not yet become part and parcel of customary international law. The farthest-reaching prescription was Art. 14 of the 1948 Universal Declaration of Human Rights. It proclaimed a human right "to seek and to enjoy in other countries asylum from persecution." A proposal to extend this guarantee to a "right to seek and to be granted asylum" was voted down. Thus the admission of refugees remained at the discretion of states.[70] An individual right of asylum did not find entry at all into the 1966 Human Rights Covenants or into the United Nations Declaration on Territorial Asylum of December 14, 1967.[71] The failed 1977 United Nations Diplomatic Conference on the Drafting of a Convention on Territorial Asylum witnessed the near-unanimous rejection of a German proposal to grant an individual right of asylum.[72] The 1951 Geneva Refugee Convention prohibits only the "expulsion" or "rejection" of refugees into territories in which their lives or liberty are threatened.[73] It leaves the most important form of protection, the initial admission of the refugee to the territory, within the realm of discretion of nation-states.[74] The same is true for

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status of a foreigner with permanent residence permit [Aufenthaltsberechtigung] in the F.R.G.

[68] *See* R. PLENDER, *supra* note 26, at 94-126 (discussion denying existence of right of access of any group of foreigners based on customary international law).

[69] M. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT (1956); O. KIMMINICH, DER INTERNATIONALE RECHTSSTATUS DES FLÜCHTLINGS 75 (1962).

[70] *See* Kimminich, BONNER KOMMENTAR ZUM GRUNDGESETZ, ZWEITBEARBEITUNG, Art. 16, Annot. 103-14 (1950).

[71] U.N. Doc. A/RES/2312 (XXII) reprinted in A. GRAHL-MADSEN, TERRITORIAL ASYLUM 161 (1980).

[72] Only the Vatican, Sweden and Italy backed this proposal. See the German delegate von Stempel's conference report in MENSCHENRECHTE UND FLÜCHTLINGSBETREUUNG 63 (Otto-Benecke-Stiftung ed. 1977).

[73] The famous principle of *non-refoulement*, embodied in Art. 33(1) of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[74] *Compare* Kimminich, *supra* note 70, Annot. 175. Even a rather liberal interpretation of the prescription reaches this result: "Although Article 33 does not oblige a state to admit anyone from outside its territory, the provision applies to the refugee as soon as he has set foot in that territory." M. PELLONPÄÄ, EXPULSION IN INTERNATIONAL LAW 313 (1984).

the European regional level: neither the 1950 European Convention on Human Rights nor its additional protocols nor the Declaration on Territorial Asylum issued by the Council of Ministers of the Council of Europe on December 5, 1977[75] grant refugees a right to be admitted.[76] The Inter-American Convention on Human Rights of November 22, 1969[77] and the 1981 Banjul Charter on Human and Peoples' Rights[78] do contain an individual right of asylum. This right, however, is subjected, in total, to the domestic legislation of the member-states, and as a consequence is left to their exclusive disposal. Besides these conventions, there are a series of promises of asylum in domestic constitutions, widely differing with respect to conditions set and practical realization.[79] Given this background of laws and policies, asylum is to be considered a right of states, not individuals, under international law.[80]

To put it differently: there is no duty among states to admit aliens into one's territory. Under international law, the admission of foreigners remains an act of grace.

B. The Treatment of Nationals

Nationals of a given country might have to be treated differ-

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[75] Reprinted in A. GRAHL-MADSEN, *supra* note 71, at 212.

[76] There is, however, some sort of legal protection for refugees under the European Convention. *See* Rogge, *Der Schutz des Asylrechts im Europarat und in der Europäischen Menschenrechtskonvention*, 1979 AWR-BULLETIN 162.

[77] OAS Treaty Series No. 36, Art. 22(7) provides that "every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."

[78] Banjul Charter on Human and Peoples' Rights, June 24-27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5. Art. 12(3) states that "[e]very individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions." (Reprinted in 21 INT'L LEGAL MAT. 59 (1982)).

[79] *See* Article 16(2)(2) of the Basic Law of the Federal Republic of Germany, and the review of other countries' prescriptions on asylum at Kimminich, *supra* note 70, Annot. 199-202; *see also* V. LIEBER, DIE NEUERE ENTWICKLUNG DES ASYLRECHTS IM VÖLKERRECHT UND STAATSRECHT 201 (1973); A. PALUDAN, ASYLUM IN EUROPE (1979); *Transnational Legal Problems of Refugees*, 1982 Michigan Y.B. Int'l Legal Stud.

[80] 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 102 (1972); S. SINHA, ASYLUM AND INTERNATIONAL LAW 277 (1971); Wiessner, *Asylverweigerung ohne Anerkennungsverfahren*, 7 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 473 (1980).

ently when they desire to (re)enter their home state. Their home state might be obligated to admit them either on first entry (if born abroad), or upon return from a stay abroad.

Such a duty of the home state to admit its nationals[81] has often been referred to as the "content of the law of nationality,"[82] as "inherent" to the international legal concept of nationality,[83] or as "so important a consequence of nationality that it is almost equated with it."[84]

Traditional international law doctrine views this duty in a more limited fashion. It sees it basically as a corollary to other states' rights to expel individuals. Schwarzenberger remarks, "To make the right of expulsion effective, the practice of States has insisted on the duty of the home state to receive back any national expelled from a foreign State."[85]

According to this view the duty of a home state to receive its nationals is limited to cases in which no other country is willing to admit the national.[86] The emergence of human rights after World War II may have had a significant impact on this doctrine. Important international documents granted individuals the right to enter or return to their country. The model prescrip-

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[81] Goodwin-Gill considers this obligation "firmly fixed within the corpus of general international law." G. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 137 (1978).

[82] 1 L. VON BAR, THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS 179-82 (1889). Lessing considers nationality the "relationship between an individual and a state, on the basis of which the state is authorized to protect the individual abroad, and is obligated to allow him residence on its territory." H. LESSING, *supra* note 6.

[83] P. WEIS, *supra* note 4, at 45-59.

[84] H. VAN PANHUYS, THE RÔLE OF NATIONALITY IN INTERNATIONAL LAW 56 (1959).

[85] 1 G. SCHWARZENBERGER, INTERNATIONAL LAW 361 (3rd ed. 1957). Pellonpää observes that the duty of the home state to admit is not owed to the expelling state, but to other states whose territory the expelled would enter if there were no such duty. M. PELLONPÄÄ, *supra* note 74, at 26. For similar observations see G. GOODWIN-GILL, *supra* note 81, at 214.

[86] L. OPPENHEIM & H. LAUTERPACHT, *supra* note 66, at 646: "The duty is that of receiving such of its citizens as are not allowed to remain on the territory of other States." *See* M. PELLONPÄÄ, *supra* note 74, at 26: "Strictly speaking, the duty of admission of nationals means only a duty to receive citizens when another state wishes to repatriate them." Similar statements are to be found in Thakrar v. Secretary of State for the Home Department, 2 All E.R. 261, 272 (1974)(Orr, L.J.)("[T]he obligation is owed, not to the individual expelled, but towards all other states and is restricted to the receiving of a national who has nowhere else to go"). *See generally* Akehurst, *Uganda Asians and the Thakrar Case*, 38 MOD. L. REV. 72-73 (1975).

tion was Article 13(2) of the 1948 Universal Declaration of Human Rights: "Everyone has the right to leave any country, including his own, and *to return to his country.*" (emphasis added).

The degree of authority and effectiveness of resolutions by the United Nations General Assembly, in particular of this Declaration, is controversial.[87] In addition, it was advanced that the "right to return" of Article 13(2) did not stand on its own feet, but was seen, by the drafters of this provision, only as a means of guaranteeing the right to leave.[88] But even if this supplementary character of the provision were recognized, it would take nothing away from its binding (or non-binding) nature. Other controversies focused on the interpretation of "his" country. Were only the members of those states that existed at the time of the leaving of the territory entitled to enjoy this right, given the intimate connection between the right to leave and the right to return?[89]

Do only nationals enjoy the right of return,[90] or does it include other individuals with strong ties to the state concerned as

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[87] *Compare* Schreuer, *Recommendations and the Traditional Sources of International Law*, 20 GERMAN Y.B. INT'L L. 103-18 (1977), with Aybay, *supra* note 27, at 134 (referring to references to the Universal Declaration of Human Rights in domestic constitutions and other legal documents). As to the effect of General Assembly resolutions under international law, *see generally* C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS, ch. III (1980); Reisman, *International Lawmaking: A Process of Communication, Lasswell Memorial Lecture*, 75 PROC. AM. SOC'Y INT'L L. 101-20 (1981).

[88] Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 614 (1978). The Lebanese amendment, according to which the words "and to return to his country" were added, was supposed to clarify only that "the right to leave a country, already sanctioned in the article, would be strengthened by the assurance of the right to return. Such was the object of [the] amendment." Inglés, *supra* note 42, at 87.

[89] This controversy revolved around the claim of the Palestinians to return to a territory that was "theirs" when they left it. Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 31 U.N. GAOR Supp. (No. 35) U.N. Doc. A/31/35 (1976)(cited in Radley, *supra* note 88); Wright, *The Prospects for Peace*, in 2 THE ARAB-ISRAELI CONFLICT 120, n. 91 (J. Moore ed. 1974); *Seminar of Arab Jurists on Palestine*, 1 THE ARAB-ISRAELI CONFLICT 363 (J. Moore ed. 1974); Dimitrijevic, *Legal Position of Palestine Refugees*, 19 REV. INT'L AFF. 18 (1968).

[90] Radley, *supra* note 88, at 613. *Contra* Mallison & Mallison, *The Right to Return*, 9 J. PALEST. STUD. 125, 127 (1980)(reference to host of United Nations resolutions on Palestine).

well, e.g. persons with permanent residence status? It has been advanced that Article 13(2) protects "any person with a recognized interest in the preservation of the human right to enter his own State."[91] This broad interpretation seems to focus on making possible an "international class action." It raises, however, more questions than it answers: What ties create that "recognized interest"? What form and degree must the "recognition" of this interest reach? A final problem with the right of return under the 1948 Declaration is its broad limiting clause[92] echoing the concerns of the ruling elites with respect to threats to national security, morality and public order.[93]

The United Nations Covenant on Civil and Political Rights of December 16, 1966[94] "codified" the right to return in a binding international agreement. Article 12(4) of this treaty mandates, "No one shall be arbitrarily deprived of the right to enter his own country."

The Covenant enjoys a high degree of authority, having been ratified by 85 states with widely varying internal decision-making structures and value systems.[95] In part, it solves the problems relating to the right of return under the Human Rights Declaration; in part, it raises new issues. By separating the right to leave (art. 12(2)) from the right to return (art. 12(4)) via a special limiting provision for the right to leave (art. 12(3)), the Palestinian claims of a special link between the right to leave and the right to return were shattered.

Furthermore, the right to enter is only to be limited in times of officially proclaimed national emergencies, and even

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[91] R. PLENDER, *supra* note 26, at 74; Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 INT'L AFF. 341-57 (1973).

[92] Art. 29(2) states:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[93] Bleicher, *The Legal Significance of Recitation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 459 (1969).

[94] 999 U.N.T.S. 171.

[95] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1986*, at 128, U.N. Doc. ST/LEG/SER.E/5 (1987)[hereinafter *Multilateral Treaties*].

then only under certain conditions. Article 4(1) of the Covenant mandates:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[96]

Until December 31, 1986, only Bolivia, Chile, Colombia, Ecuador, El Salvador, Nicaragua, Peru, Poland, Sri Lanka, the United Kingdom (concerning Northern Ireland) and Uruguay had made use of this provision. Only Bolivia, Chile, Colombia, El Salvador, Nicaragua and Peru expressly restricted the exercise of Article 12(4).[97]

Article 12(4) raises two main issues:

(1) What is to be considered an "arbitrary" denial of the right to enter?

(2) Does its scope of protection also cover aliens with particularly strong ties to a foreign country?

Pellonpää advances an interesting interpretation. After reviewing the *travaux préparatoires* of the provision and comparing it with Article 25 of the Covenant he reaches the result that not only nationals, but also foreigners who have found their "home" in the state concerned, are covered by the scope *ratione personae* of that norm.[98] This would include, in particular,

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[96] The prohibition of discrimination is already contained in Article 5(d)(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination of March 7, 1966, 660 U.N.T.S. 195. This agreement, ratified by 124 states, outlaws any discriminatory treatment on the basis of race, color or ethnic origin with respect to the "right to leave any country, including one's own and to return to one's country." *Multilateral Treaties*, *supra* note 95, at 103-04.

[97] *Multilateral Treaties*, *supra* note 95, at 140-48.

[98] The author refers to earlier drafts of the Covenant that stated the right of "nationals" to enter their homeland. These drafts were modified to the effect of covering also persons "who were not nationals but who had established their home in the country." M. PELLONPÄÄ, *supra* note 74, at 137.

aliens with rights of permanent residence.[99] On the other hand, he argues, denial to nationals of the right of return might be "inherently arbitrary," since the chance to reside in the home country was an "integral element" of the concept of nationality: not "arbitrary" could then only be the denial of entry for non-nationals.[100]

Pellonpää himself views this construction of Article 12(4) as weakened by discussions in the drafting phase of the Covenant. These controversies revealed the lack of unanimity on a strict prohibition of the exclusion of nationals.[101] Doubtless, the prohibition of arbitrary denial of the right of entry was intended to limit the states' freedom to a greater extent than Article 12(3) did with respect to the right to leave.[102] If Pellonpää's interpretation was to reflect the intention of the drafters, it has been expressed in a remarkably inadequate way in the text of the Covenant.

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[99] Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 183 (L. Henkin ed. 1981)(alien who is permanent resident insofar as protected by Article 12(4) cannot be expelled under Article 13).

[100] M. PELLONPÄÄ, *supra* note 74, at 25, 138. This interpretation found its way, most recently, into the so-called Strasbourg Declaration on the Right to Leave and Return, adopted by the International Institute of Human Rights on November 26, 1986, and reprinted in 81 AM. J. INT'L L. 434 (1987).

Article 6 of the Declaration goes into specifics and states categorically:

a) No one shall be deprived of the right to enter his or her own country.

b) No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country.

c) No entry visa may be required to enter one's own country.

Article 7 retains the "arbitrariness" language with respect to permanent residents: "Permanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country."

The purpose of the Stasbourg Declaration was to assist the special rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in his task of drawing up a draft declaration on the right to leave and return for consideration by the United Nations Commission on Human Rights. For more details *see* Hannum, *The Strasbourg Declaration on the Right to Leave and Return*, 81 AM. J. INT'L L. 432 (1987).

[101] REPORT OF THE THIRD COMMITTEE, U.N. GAOR (14th plen. mtg.) at 6, 8 (U.N. Doc. A/4299, para. 17)(cited in Pellonpää, *supra* note 74, at 138).

[102] *Report of the Third Committee*, *supra* note 101, para. 59; M. PELLONPÄÄ, *supra* note 74, at 138. As to the concept of "arbitrariness" see Jagerskiold, *supra* note 101, at 181. Article 12(3) allows restrictions of the right to leave, *inter alia*, if they are "necessary to protect national security, public order, public health or morals or the rights and freedoms of others."

For this reason, it is all the more necessary to look at regional agreements and domestic state practice. Article 3(2) of the Fourth Additional Protocol to the European Convention on Human Rights of September 16, 1963,[103] states clearly: "No one shall be deprived of the right to enter the territory of the State of which he is a national."

Similarly, Art. 22(5) of the Inter-American Convention on Human Rights[104] prescribes: "No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it."

Also, Article 12 of the African human rights document, the 1981 Banjul Charter on Human and Peoples' Rights,[105] grants full substantive protection against deprivations of this right. The provision, however, contains the ambiguous reference to "his" country: "Every individual shall have the right to leave any country including his own, and to return to his country."

The answer of the majority of the regional systems to the deficiencies of the U.N. Covenant is, accordingly, the extension of the scope of protection *ratione materiae* to all denials of entry, and the restriction of the scope of protection *ratione personae* to nationals.[106]

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[103] 1968 BGBl.II 423 (W. Ger). The English translation of this statute is contained in BASIC DOCUMENTS IN INTERNATIONAL LAW 344 (I. Brownlie 3rd ed. 1983).

[104] OAS Treaty Series No. 36.

[105] OAU Doc. CAB/LEG/67/3/Rev.5, contained in 21 INT'L LEGAL MAT. 58 (1982); *see* Umozurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902 (1983). It entered into force on October 21, 1986. By April 16, 1987, 33 states were parties to the charter, making it the largest regional human rights system in existence. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L L. 80, 81 (1988).

[106] A Council of Europe Committee of Experts on Human Rights charged with comparing the provisions of the U.N. Covenants and, *inter alia*, the Fourth Additional Protocol reached the following result:

> It might be thought that the Covenant text is wider in scope and that it might possibly apply, e.g. to a stateless person or to an alien having very close ties by virtue, for example, of birth or permanent residence in the territory concerned. But it might also be that the Covenant text is less precise in wording than its European counterpart.

Human Rights, Problems Arising from the Co-Existence of the U.N. Covenants on Human Rights and the European Convention on Human Rights, Council of Europe Doc. H (70), at 7 (cited in Aybay, *supra* note 27, at 127). This analysis demonstrates, again, the poor drafting of Art. 12(4) of the U.N. Covenant.

As to the limitations of this right, both the Inter-American Human Rights Convention[107] and the European human rights instruments[108] allow restrictions to this right only in situations of war or other public emergencies which threaten the life of a nation. The Secretary-General of the organization concerned must be notified of the state of emergency.[109] In contrast, the African Charter, in close reliance on the 1948 Universal Declaration, allows broad limitations for purposes of "national security," "law and order," and "public health or morality."[110]

The European Court of Justice, one of the main organs of the European Economic Community, a developing regional system with increasing general political ambition, declared in a decision of 1975: "[I]t is a principle of international law, which the E.E.C. Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing to its own nationals the right of entry or residence."[111]

Whether this right of a national to enter his home country, virtually unrestricted under the European and American regional systems, corresponds to the actual practice of States is subject to the following analysis. It starts with the examination of the "law in action" in the representative systems of the United States of America, the USSR and the Federal Republic of Germany.

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[107] Art. 27(1) states:

> In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion or social origin.

[108] Art. 6(1) of the Fourth Additional Protocol in conjunction with Art. 15 of the 1950 European Convention of Human Rights. Aybay, *supra* note 27, at 128, is correct in stressing the evident similarities between the European and the American guarantee.

[109] In this aspect, the procedure is congruent to the one used under the 1966 U.N. Covenant.

[110] Art. 12(2)(2) provides that "[t]his right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality."

[111] Van Duyn v. Home Office, 1 COMMON MKT. L. REV. 1, 18 (1975).

1. United States of America

The first case of a national's claim of a right to enter the United States was raised, interestingly enough, by a "non-citizen national" from Puerto Rico.[112] On August 24, 1902, Isabella Gonzales, a citizen of Puerto Rico, arrived at the Port of New York. U.S. immigration authorities denied her entry and detained her as an "alien immigrant" in order to secure her deportation to Puerto Rico in case she was considered a prospective burden for the community. Ms. Gonzales filed suit in federal court to protect her rights as a "United States national." The issue, ultimately to be decided by the U.S. Supreme Court, was whether Isabella Gonzales was to be considered an "alien immigrant" under the U.S. Immigration Act of 1891. Chief Justice Fuller avoided any discussion of the status of Puerto Ricans under the U.S. Constitution. He stated, however, that the citizens of this island were not "aliens" under the U.S. immigration act:

> We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico [sic], whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to

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[112] Under the Treaty of Paris of December 10, 1898, 30 Stat. 1754, T.S. No. 343, sovereignty over the Philippines, Guam and Puerto Rico passed from Spain to the United States. The Foraker Act of 1900, codified at 48 U.S.C. § 733 (1982), conferred upon the citizens of Puerto Rico only "United States nationality," not "United States citizenship," the main goal being to deny the new members of the "American Empire" full civil and political rights. J. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 1-6 (1979). As to the distinction between the status of a U.S. national and of a U.S. citizen, see 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-2 (1942); Coudert, *Our New Peoples: Citizens, Subjects, Nationals or Aliens?*, 3 COLUM. L. REV. 13 (1903); McGovney, *Our Non-Citizen Nationals, Who Are They?*, in LEGAL ESSAYS 323 (1935); Wilson, *Gradations of Citizenship and International Relations*, 33 AM. J. INT'L L. 146 (1939). The United States Supreme Court approved this distinction in a series of decisions in 1901, the so-called "Insular Cases": De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901). It was not until 1917, with passage of the Jones Act (Puerto Rico), ch. 145, § 5, 39 Stat. 951, that the United States conferred its citizenship to the citizens of Puerto Rico.

> support the Constitution of the United States, are not "aliens", and upon their arrival by water at the ports of our mainland are not "alien immigrants" within the intent and meaning of the act of 1891.[113]

Gonzales v. Williams in effect gave "United States nationals" what Chief Justice Taft later recognized in 1922 to be the only right that Puerto Ricans acquired with United States citizenship in 1917: the right "to move into the United States."[114] This "right", however, was derived from the interpretation of a simple statute; the issue of a *constitutional* right of access by a U.S. national or citizen was not addressed.

This issue was again neglected in a Supreme Court decision one year after *Gonzales*, although squarely presented in *United States v. Ju Toy*.[115]

At the port of San Francisco, United States immigration authorities denied entry to Mr. Ju Toy and detained him for deportation to China. Ju Toy, born in the United States, was an American citizen of Chinese descent. After a temporary sojourn abroad, he returned to the United States. The Supreme Court denied the habeas corpus relief requested. In one of the less impressive opinions of his distinguished career, Justice Oliver Wendell Holmes wrote for the majority of the Court:

> The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process does not require a judicial trial.[116]

Justice Brewer voiced his opposition in a scathing dissent:

> It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the conten-

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[113] Gonzales v. Williams, 192 U.S. 1, 13 (1904).
[114] Balzac v. Porto Rico, 258 U.S. 298, 308 (1922).
[115] 198 U.S. 253 (1905).
[116] *Id.* at 263 (1905).

> tion of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime for it is no crime for a citizen to come back to his native land must by the action of a ministerial officer be punished by deportation and banishment, without trial by jury and without judicial examination. Such a decision is to my mind appalling.[117]

Up to the present day, a clear decision by the U.S. Supreme Court on a citizen's constitutional right to enter is missing. In the absence of such guidance, the United States Court of Appeals for the Fifth Circuit addressed the issue in *Worthy v. United States*.[118]

Worthy, an author, had undertaken a trip to Havana without the required authorization. In doing this, he had violated the travel restrictions contained in his passport.[119] After his return, he was convicted of illegal entry into the United States[120] and sentenced to three months in jail, on nine months probation. Worthy appealed. The Fifth Circuit reversed the decision, arguing: "We think it is inherent in the concept of citizenship that the citizen, when absent from the country to which he owes allegiance, has a right to return, again to set foot on its soil."[121]

The Court backed up this opinion by referring to two decisions of the United States Supreme Court, *United States v. Ju Toy*[122] and *United States v. Wheeler*.[123] These references, however, do not withstand scrutiny. *Ju Toy* did not state, as the Fifth Circuit asserts, that "to deny entrance of a citizen into the United States was a deprivation of a liberty secured by the Fifth Amendment"; Justice Holmes assumed this only *arguendo*. The

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[117] *Id.* at 269 (Brewer, J., dissenting).

[118] 328 F.2d 386 (5th Cir. 1964).

[119] In 1963, trading with, and travel to, Cuba by U.S. citizens was severely restricted, the legal basis being the 1917 Trading with the Enemy Act. Up to the present day, U.S. passports are not validated for travel to Cuba, Vietnam, Cambodia, Laos, Libya and North Korea. The U.S. Supreme Court, in 1964, affirmed the Government's refusal to validate passports for travel to Cuba. Zemel v. Rusk, 381 U.S. 1, 13-16 (1964).

[120] The entry was considered illegal because it was allegedly undertaken "without a valid passport" within the meaning of § 215(b) of the 1952 Immigration and Nationality Act. *Worthy*, 328 F.2d at 390.

[121] *Worthy*, 328 F.2d at 394.

[122] 198 U.S. 253 (1905).

[123] 254 U.S. 281 (1920).

other decision, *United States v. Wheeler*, applied only to migration between the federal states of the Union.[124] In any event, the Fifth Circuit even went beyond a mere right of entry of a U.S. citizen:

> We do not think that a citizen absent from his country can have his fundamental right to have free ingress thereto subject to a criminal penalty if he does not have a passport. The citizen, culpable though he may have been in leaving his country without a passport which he could not obtain, and subject, as he probably was, to a criminal penalty for departing without a passport, cannot, we think, be required to choose between banishment or expatriation on the one hand or crossing the border on the other hand, being faced with criminal punishment and the loss of some of the rights and privileges of citizenship as a felon. . . . [I]t is our conclusion that the Government cannot say to its citizen, standing beyond its border, that his reentry into the land of his allegiance is a criminal offense; and this we conclude is a sound principle whether or not the citizen has a passport, and however wrongful may have been his conduct in effecting his departure.[125]

Three years later, in a similar case, the United States Supreme Court did not go quite as far. The case concerned a conviction of "conspiracy" to travel to Cuba in violation of the territorial limitation of the passport. The Court decided in favor of the defendants not, however, on the basis of the concept of citizenship, as the Fifth Circuit did, but on the much narrower statutory basis that reentry into the United States with a restricted passport is not to be equaled with an entry without a "valid passport" within the meaning of § 215 (b) of the Immigration and Nationality Act.[126] In *obiter dictum*, § 215 (b) was expressly

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[124] *Wheeler*, 254 U.S. at 293. In *Wheeler* 196 citizens and 25 residents of the state of Arizona alleged that their constitutional rights had been violated by their forcible deportation to New Mexico, and by the threat of death or severe injury upon subsequent return to Arizona. *Id.* at 292. The court ruled on their behalf, holding that: "[T]he citizens [of all states] thereof possessed the fundamental right . . . to dwell within the limits of their respective states, . . . to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right." *Id.* at 293.

[125] *Worthy*, 328 F.2d at 394.

[126] United States v. Laub, 385 U.S. 475, 481 (1967).

affirmed as constitutional.

Up to the present day, § 215 (b) of the Immigration and Nationality Act has prescribed:

> Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.[127]

Consequently, a United States citizen's right to enter is made dependent, in principle, on the possession of a valid passport. According to two landmark decisions of the U.S. Supreme Court,[128] the issuance of a passport is protected by the fifth amendment right to travel and may not even be denied to Communists. Despite the uncertainties about the constitutional status of a citizen's right to reenter the United States, it is reasonable to conclude that this right will not be impaired. In the words of a leading expert, Charles Gordon, "Congress has never barred the entry of United States citizens, and doubtless never will. Indeed, any legislative attempt to bar the entry of a citizen unquestionably would be an unconstitutional abridgement of his right of free access to the country of his nationality."[129]

2. USSR

Entry and reentry of citizens into the USSR is regulated by the USSR Statute on Entry Into and Exit From the USSR of September 22, 1970, as amended.[130] This enactment is part of a

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[127] 8 U.S.C. § 1185 (1982).

[128] In Kent v. Dulles, 357 U.S. 116, 125 (1958), the Court held that the right to travel was "a part of the 'liberty' of which the citizen cannot be deprived without due process of law." In Aptheker v. United States, 378 U.S. 500, 514 (1964), the Court invalidated a provision of the 1950 Subversive Control Act that prohibited the issuance of passports to members of the Communist Party as "sweep[ing] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment."

[128] C. GORDON & E. GITTEL GORDON, IMMIGRATION AND NATIONALITY LAW 2-9 (1982).

[130] SP SSSR 1970 no. 18 item 139 (authoritative English translation in U.N. Doc. E/CN.4/1098/Add.25, at 33-36 (Jan. 9, 1974)). This statute was amended on August 28, 1986 by adding Articles 20-30, SP SSSR 1986, no. 31, item 163. An English translation of the full text of the statute appears in *Union of Soviet Socialist Republics: Statute on Entry Into the USSR and Exit From the USSR*, 26 INT'L LEGAL MAT. 425 (1987).

comprehensive system of the regulation of movement of Soviet citizens[131] that finds its expression in an internal passport system with rigid duties of registration,[132] and the strict obligation to follow the orders of the Soviet consul while residing abroad.[133] Although Soviet doctrine of international law recognizes the duty of a state to take back its citizens only in cases in which foreign states deny admission,[134] the Statute of 1970 guaranteed a virtual right of Soviet citizens to enter the USSR:

> 1. Soviet citizens shall be permitted to enter the Union of Soviet Socialist Republics on valid Soviet diplomatic, official and civil passports, seamen's passports and re-entry certificates.
> Soviet citizens who are permanently resident abroad and who hold valid Soviet civil passports shall be permitted to enter the Union of Soviet Socialist Republics provided that a Soviet embassy, mission or consulate has made entries in the passports to show that such persons have been deleted from the register because they are travelling to the Soviet Union. . . .
> 8. In order to leave the USSR, reside abroad and re-enter the USSR, a citizen of the Union of Soviet Socialist Republics may be issued with:
> (a) a diplomatic passport;
> (b) an official passport;
> (c) a seaman's passport;
> (d) a civil passport.
> In order to return to the USSR, a person not holding one of the above-mentioned documents may be issued with a re-entry certificate.

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[131] Corresponding to this harsh system of control are extensive interpretations of the concept of citizenship. V. SHEVTSOV, CITIZENSHIP OF THE USSR 20-21 (1979). "[C]itizenship is a legal relationship between person and state which allows the jurisdiction of that state to be extended to the person in a permanent, full and stable manner, being thereby the necessary prerequisite of the possibility of applying to the person the laws of the given state." *Id.*

[132] *See* Pass Ordinance of 1974, SP SSSR no. 19 item 109, effective January 1, 1976. *See also* Uibopuu, *Die neue Passordnung der UdSSR und die Reizügigkeit von Sowjetbürgern*, 1983 RECHT IN OST UND WEST 245, 245-46.

[133] Art. 27(2) of the Consular Ordinance of June 25, 1976, Ved. Verkh. Sov. SSSR 1976 no. 27 item 404. Uibopuu claims that this practice violates international law by exceeding the limits of a state's sovereign powers over its citizens. Uibopuu, *Die Staatsangehörigkeit*, 1978 OSTEUROPA-RECHT 65.

[134] G. GINSBURGS, THE CITIZENSHIP LAW OF THE USSR 62 (1983). The reason given is that a state is not allowed to burden another state with its citizens. *Id.*

> 9. Diplomatic, official and civil passports shall be issued to citizens of the Union of Soviet Socialist Republics travelling abroad by the Ministry of Foreign Affairs of the USSR and the Ministries of Foreign Affairs of the Union Republics in accordance with paragraphs 13, 14 and 16-18 of these Regulations. Citizens of the Union of Soviet Socialist Republics who are abroad shall be issued with diplomatic, official and civil passports and certificates to re-enter the USSR by Soviet embassies, missions and consulates and, in particular cases, by specially authorized Soviet representatives.[135]

This represented a comparatively generous regulation of entry, as exemplified by the passport substitute of a "re-entry certificate."[136] The requirement of passports, combined with harsh border controls,[137] had marked a regression into pre-revolutionary practices abolished by Lenin in the immediate aftermath of the October Revolution; restrictive measures were reinstated, at the very latest, in 1932 with the Soviet Pass Ordinance.[138] Obviously, the problem of the Soviet state is not how to prevent massive immigration, or remigration. This may have been one reason for a rather liberal guarantee of return for Soviet citizens.

Another reason may have been the strong increase in the numbers of persons who lost Soviet citizenship prior to leaving the USSR. Until recently it was professed Soviet policy, though not a statutory prerequisite, to release emigrants from Soviet

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[135] U.N. Doc., *supra* note 130, at 33-34.

[136] The "civil passport" mentioned in the Regulations is the general passport authorizing movement across state borders. It is not to be confused with the Soviet citizens' internal passport required for travel within the USSR. *See* Uibopuu, *supra* note 132, at 245.

[137] *See* Toman, *The Right to Leave and to Return in Eastern Europe*, 5 ISRAEL Y.B. HUMAN RTS. 276, 292, 306 (1975)(describing management of Iron Curtain).

[138] By *ukaz* of October 30, 1719, Tsar Peter the Great had introduced a unitary passport system throughout the Russian Empire. It required peasants to procure a passport even when only temporarily absent. It was only in 1894 that the general duty of carrying a passport was lifted with respect to the permanent residence.

By initially abolishing external as well as internal passports, Lenin realized part of his goals enunciated in the platform of the Russian Social-Democratic Party: "[T]he Party demands first and foremost: . . . abolition of passports, full freedom of movement and residence." W. LENIN, COLLECTED WORKS 97 (3rd ed. 1928-1937).

For details *see* Uibopuu, *supra* note 132, at 246.

citizenship only if and when they acquired a new nationality.[139] This policy is still reflected to some extent in Article 5 of the 1978 USSR Citizenship Act, which indicates that the mere residence of a Soviet citizen abroad does not in and of itself entail the loss of USSR citizenship.[140] Today Soviet authorities tend to request would-be emigrants, specifically Jews and Koreans, to give up their Soviet citizenship prior to leaving the USSR irrespective of whether or not they have secured a new nationality.[141] In part, this shift in policy is justified by the argument that the Soviet Union's duty to protect its citizens, under Article 6 of the Citizenship Law, is impossible to achieve with target countries such as Israel or South Korea because of the lack of diplomatic relations.[142] More probable is the interpretation that denationalization and subsequent expulsion simply serves to get rid of dissidents.[143] The consequences of this new policy for the right of Soviet citizens to return are evident: by minimizing the category of "disloyal" Soviets abroad narrow restrictions on the citizens' right to return become largely unnecessary.

This policy demonstrates the close relationship of the right to return and nationality in the legal system of the USSR. It also raises the issue of whether other states must recognize one state's attempt to extricate itself from its duty to admit its nationals by simply denationalizing them. To put the issue in a slightly different way: Does a state have a duty, under international law, to admit its former nationals who are now stateless and have not found a state that is willing to admit them to its territory? The majority of scholars seems to assume such an ob-

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[139] *See* G. GINSBURGS, *supra* note 134, at 338 (noting motive to avoid statelessness).

[140] Law on Citizenship of the USSR of December 1, 1978, Ved. Verkh. Sov. SSSR 1978, no. 49, item 816. Translated into English in USSR LEGISLATION, *supra* note 60, no. I-6.

[141] *See* G. GINSBURGS, *supra* note 134, at 61, 370 ("the Soviet apparatus feels free to indulge in the wholesale manufacture of stateless exiles to satisfy its ideological and political preconceptions"). Ginsburgs considers this practice a violation of Article 5 of the USSR Citizenship Law. *Id.* at 61. The mere stay of a citizen abroad, however, does not automatically lead to the loss of Soviet citizenship, even in the case of an emigrant. Under the new practice, the loss of citizenship occurs prior to the emigrant's departure.

[142] *Id.* at 65.

[143] M. PELLONPÄÄ, *supra* note 74, at 24 (reference to such practices throughout Eastern bloc, and in Greece during reign of military *junta*).

ligation;[144] the same is true for the prestigious Institute of International Law.[145] The 1930 Hague Conference on the Codification of International Law failed, however, to codify such a duty;[146]

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[144] Fischer-Williams, *Denationalisation*, 8 BRIT. Y.B. INT'L L. 55 (1927); Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L.J. 250 (1934-35). Lessing views the former home state's duty of admission to be an accompanying obligation, and ultimately an aftereffect, of prior recognition of the expatriated national. From this stance repatriation treaties are merely manifestations of a greater underlying principle. H. LESSING, *supra* note 6, at 113, 153. Weis draws the opposite conclusion from the existence of repatriation treaties: states had to enter into those agreements because customary international law did not mandate such a duty. Nevertheless, he concludes that a state would act illegally, "in fraudem juris internationalis," if it would denationalize nationals resident abroad solely for the purpose of denying them the right to return. P. WEIS, *supra* note 4, at 57.

[145] *See* Art. 2 of the resolution on admission and expulsion of aliens, passed at the 1892 session of the Institute in Geneva: "En principe, un Etat ne doit pas interdire l'accès ou le séjour sur son territoire soit à ses sujets, soit à ceux qui, après avoir perdu leur nationalité dans ledit Etat, n'en ont point acquis une autre." 12 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 219 (1892-1894).

See also Art. 8 of the resolution on stateless persons and refugees passed at its 1936 session in Brussels:

> Si un Etat a, par une mesure d'autorité, retiré sa nationalité à un de ses sujets d'origine, et si celui-ci n'a pas acquis d'autre nationalité, ledit Etat devra néanmoins, à la demande de tout Etat sur le territoire duquel l'intéressé se trouve, et moyennant l'assentiment de ce dernier, le recevoir chez lui à moins qu'un autre Etat n'accepte de le recevoir. Les frais de rapatriement seront à la charge de l'état auquel incombe la précédente obligation."

39-II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 298 (1936).

[146] In preparation of this meeting, the Harvard Law School staged a draft convention. Article 20 as proposed established a state's duty to admit former nationals until the time of their acquiring another nationality. 23 AM. J. INT'L L. 13, 77 (Spec. Supp. April 1929). The official Prepatory Committee submitted the following text as a "basis of discussion": "If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose national he was remains bound to admit him to its territory at the request of the State where he is residing." P. WEIS, *supra* note 4, at 53.

The states represented at the Hague Conference were not willing to accept this proposal. In its stead, they passed, on April 12, 1930, a so-called "Special Protocol Concerning Statelessness". The operative provision, Article 1, reads as follows:

> If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:
>
> (1) if he is permanently indigent either as a result of an incurable disease or for any other reason; or
>
> (2) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.
>
> In the first case the State whose nationality such person last possessed

one of the main opponents was the USSR.[147] Be that as it may, the 1970 Statute seemed to have guaranteed Soviet citizens the right of entry into the USSR, subject to the fulfillment of certain administrative requirements.

This state of the "law in the books" has changed with the August 26, 1986 addition of more substantive provisions to the 1970 Statute. The amendment was entitled *Consideration of Applications Concerning Entry into the USSR and Exit from the USSR.*[148] Besides administrative details applicable to the entry of Soviet and foreign citizens alike, it includes a substantive provision, Article 26, which outlines the grounds for possible restrictions on the return of Soviet citizens permanently residing abroad:

> may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the 30th day of the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request.

Special Protocol Concerning Statelessness, Conference for the Codification of International Law, League of Nations Doc. C.27.M.16.4 1931 V.

This protocol was considered so inadequate that the Final Act of the conference included a recommendation for its revision. P. WEIS, *supra* note 4, at 27. The protocol has not yet entered into force, for failure to obtain the necessary ten ratifications. *Multilateral Treaties*, *supra* note 95, at 800.

The "modern" way of addressing and solving the problem is to condition the loss of nationality upon the acquisition of a new one. *See generally*, Articles 5 through 10 of the United Nations Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175. These provisions became effective beginning December 13, 1975 amongst 14 states. *Multilateral Treaties*, *supra* note 95, at 201.

The 1986 Strasbourg Declaration on the Right to Leave and Return would make the individual right to leave paramount, outlawing its tying to renunciation of citizenship. Article 3 provides:

> (b) No person shall be required to renounce his or her nationality in order to leave a country, nor shall a person be deprived of nationality for seeking to exercise or for exercising the right to leave a country.
>
> (c) No person shall be denied the right to leave a country on the grounds that that person wishes to renounce or has renounced his or her nationality.

Hannum, *The Strasbourg Declaration on the Right to Leave and Return*, 81 AM. J. INT'L L. 434, 435 (1987).

It is subject to serious doubt, however, whether these aspirations reflect current state practice.

[147] G. GINSBURGS, *supra* note 134, at 63.

[148] *See supra* note 130 (English text in *Union of Soviet Socialists Republics: Statute on Entry Into the USSR and Exit From the USSR*, 26 INT'L. LEGAL MAT. 425, 429-32 (1987)).

> The entry into the USSR of a Soviet citizen residing permanently abroad may be temporarily not authorized only in exceptional circumstances when this is necessary in order to ensure State security, protection of public order, the health, or morality of the populace, or the protection of the rights and legal interests of Soviet citizens and other persons.[149]

These are broadly formulated restrictions indeed, but purposefully limited to "exceptional" circumstances. Only their actual interpretation by administrative practice, possibly influenced by the present overall policy of *glasnost*, will tell if and in what spirit they will be implemented.

3. Federal Republic of Germany

The legal right of all Germans to enter the territory of the F.R.G. is clearly established. According to the prevailing view of courts and scholarly opinion, this right emanates directly from the constitutional guarantee of free migration.[150] The Federal Constitutional Court, authoritative interpreter and so-called "guardian of the constitution,"[151] as well as the prevailing trend in scholarly opinion as reflected in highly respected commentaries on the Basic Law[152] have embraced this constitutional basis, following a groundbreaking 1954 article by the eminent Tübingen scholar Günter Dürig.[153] A minority view derives the right to enter not from the Basic Law, but sees it as a direct consequence of nationality,[154] thus disrobing the right of entry from direct constitutional protection.

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[149] *Id.* at 431.

[150] The 1949 Basic Law provides: "All Germans shall enjoy freedom of movement throughout the federal territory." *Grundgesetz* art. 11(1).

[151] BVerfGE 2, 266, 271; 43, 203, 211; *see also* OVerwG Lüneburg 1952 NJW 159.

[152] Dürig, in T. MAUNZ, G. DÜRIG, R. HERZOG & R. SCHOLZ, GRUNDGESETZ, Art. 11 Annot. 92-94; A. HAMANN & H. LENZ, DAS GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, Art. 11 Annot. B 2 (3rd ed. 1970); Kunig, in 1 GRUNDGESETZ-KOMMENTAR, Art. 11 Annot. 16 (I. v. Münch 3rd ed. 1985).

[153] Dürig, *supra* note 25, at 507, 516-19.

[154] Scholler, *Staatsangehörigkeit und Freizügigkeit: Zum Problem des Rückrufs und seiner Sanktionen*, 1967 DIE ÖFFENTLICHE VERWALTUNG 469, 472; K. DOEHRING, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 337 (3rd ed. 1984). This theory would allow for broader restrictions upon the right of entry under German law. *See* Kunig, *supra* note 152.

Following the prevailing view of the courts, the limitations on the right of entry are those put on the right to freely migrate within the Federal Republic. According to Article 11(2) of the German Basic Law, the right of entry of German citizens may then:

> be restricted only by or pursuant to a law and only in cases in which an adequate basis of existence is lacking and special burdens would arise to the community as a result thereof, or in which such restriction is necessary to avert an imminent danger to the existence of the free democratic basic order of the Federation or a Land, to combat the danger of epidemics, to deal with natural disasters or particularly grave accidents, to protect young people from neglect or to prevent crime.

Such a law was enacted on August 22, 1950: the Statute on Emergency Admissions.[155] It required prior permission for entry of Germans from the Soviet zone of occupation into the territory of the Federal Republic. Such permission could not be denied to persons leaving the Soviet zone due to an "imminent threat to life and limb, to personal freedom or for other compelling reasons."[156] The Federal Constitutional Court upheld the constitutionality of this statute. It held that the right to entry could be restrained by the government's reservation of prior permission if the protection of a common good of overwhelming importance so required.[157] Nevertheless, any restriction had to be proportionate and had to comply with other requirements of the Basic Law.[158] A general and final deprivation of the right of entry for refugees from the Soviet zone, or, as it is now called, the German Democratic Republic, would violate the constitution. In any case, it has to be determined whether the requirements of Art. 11(2) of the Basic Law are met.[159] As of June 1, 1968, the Fourth

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[155] Gesetz über die Notaufnahme von Deutschen in das Bundesgebiet, 1950 BGBl.I 367.

[156] *Id.*

[157] BVerfGE 2, 279.

[158] Art. 19(1) and (2) of the Basic Law, protecting the "core" of the constitutional guarantee, whatever that may be. BVerfGE 2, 284. *See also* H. v. MANGOLDT & F. KLEIN, DAS BONNER GRUNDGESETZ, Art. 11 Annot. IV 6 (2nd ed. 1957).

[159] BVerfGE 2, 275-76, 278-79; G. LEIBHOLZ & H.J. RINCK, GRUNDGESETZ Art. 11 Annot. 3a (6th ed. 1979).

Protocol to the European Convention on Human Rights is binding upon the Federal Republic:[160] restrictions of the nationals' right to enter, thus, have to be justified by the existence of a "public emergency threatening the life of the nation."

The special problem of admission of Germans from the GDR results from the reference of the Federal Republic to the German Reich for the purposes of defining German nationality. It leads to the consequence that a great many, if not most of the persons viewed by the GDR as its citizens are viewed by the Federal Republic as German nationals, opening access to the federal territory. The fear of mass influxes from the GDR, leading to the 1950 Statute on Emergency Admissions, did not materialize; harsh border controls by the GDR prevented any kind of mass defections.

German residents of the F.R.G. are subject to no substantive restrictions of reentry after residence abroad. They must establish their legitimacy by producing a German passport at the border.[161] The Passport Act of 1952 forbids denial of such a document.[162] Further, in cases of emergency Germans may enter the federal territory without the passport.[163]

What conclusions may be drawn from the reported practices and domestic laws of the three representative systems? Are

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[160] 1968 BGBl. II 1109.

[161] Section 1 of the Passport Act of March 4, 1952, Passgesetz, 1952 BGBl.I 290.

[162] Section 7(3) of this statute reads as follows: "A passport for the purposes of return to the territory of legal effect of the Basic Law, including the territory of the Land Berlin, may not be denied, unless there is a case of subsection 2 lit. a [pending procedure on the proof of nationality]." [author's translation.]

Partsch formulates differently: "An exception can be made only in the case of an actual threat to public security or the basic principles of the free democratic fundamental order," referring to § 7(3) as a source for this comment. Partsch, *The Right to Leave and to Return in the Countries of the Council of Europe*, 5 ISRAEL Y.B. HUMAN RTS. 215, 235-36 (1975).

Section 7(3) of the Passport Act, however, does not contain such a restriction, nor are there other statutory norms that would meet the requirements of Art. 11(2) of the Basic Law.

[163] Partsch, *supra* note 162, at 235. *See* § 39(1) of the General Regulations Implementing the Passports Act of August 28, 1961 as amended on December 20, 1963, reprinted in Hinzen, 1 PASSRECHT (January 1986):

> German travellers without sufficient documentation may be issued a travel document for temporary travel if their rejection would constitute an inequitable hardship and if there are no security concerns." [author's translation.]

there common responses by the ruling elites to the claims of nationals seeking reentry? First of all, each legal system adheres to the international legal principle requiring admission of nationals if no other state is willing to admit them. Such a duty does not exist with respect to aliens. As a result, one may identify the first common reaction of legal systems to the possession of nationality. That is, the first "function" of nationality: the duty of the home state to admit those of its citizens that are unwanted abroad.

Whether there is common recognition among the three representative systems of a *right* of nationals to enter the home state is not entirely clear. The United States and the USSR appear to have enacted such a right internally, although they tie it to administrative prerequisites. The Federal Republic of Germany has created statutory exceptions from the right to enter, exceptions that remain within both the limits of the constitution and of the European Convention of Human Rights. Hence, the lowest common denominator of all three systems appears to be that nationals do have a right to enter their home territory except in the case of a national emergency. Is this the second "function" of nationality? Such a conclusion may be drawn only with the benefit of a broader basis for comparative analysis than that afforded by the three systems specifically detailed.

4. Overview of Other Legal Systems

The harshest immigration controls exist in the countries of the Eastern bloc but less in order to block the influx of people than to prevent a mass exodus. Although entry of nationals often requires passports and visas,[164] the ruling elites in these countries are strongly interested in the return of their citizens. A good example is the German Democratic Republic (GDR). Traditionally, the unauthorized departure from this state was punished harshly as a crime of "flight from the Republic." However, a 1964 decree of the State Council granted amnesty to those citizens who returned to the GDR.[165] When this offer did not

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[164] Toman, *supra* note 137, at 276, 292, 306.

[165] Partsch, *supra* note 162, at 231.

achieve the results desired the GDR enacted a statute, in 1972, stripping individuals who had fled the country before January 1, 1972 of GDR citizenship.[166] In addition, all of the Eastern bloc countries have ratified the United Nations human rights covenants of 1966.[167] Consequently, they have conceded to their citizens at least the right, absent a national emergency, not to be denied entry "arbitrarily."[168] In practice, problems with the right of entry rarely arise since the reentry of "undesirable" citizens living abroad is readily preventable by their denationalization or release from citizenship.[169]

In reference to Western Europe, it is of little surprise that Spain and Portugal, under the Franco and Salazar regimes, did not generally grant rights of return. After the Civil War, many Spaniards found themselves excluded from access to their native land.[170] Ireland also has been reported as one of the countries lacking an express or implied right of return.[171] However, Ireland adopted the Fourth Protocol to the European Convention of Human Rights on October 29, 1968.[172] In France, the "liberté d'aller et de venir" is a tenet of the unwritten legal principles of personal freedom established by the Council of State. Such liberty encompasses the citizen's right to enter or to leave French territory.[173] The Netherlands view the national's right to return

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[166] Law on the Regulation of Questions of Citizenship of October 16, 1972, Gesetz zur Regelung von Fragen der Staatsbürgerschaft, 1972 GBl.I 265. This statute has been extended *ratione temporis* to persons who left the GDR before January 1, 1981, by the Ordinance on Questions of Citizenship of June 21, 1982, Verordnung zu Fragen der Staatsbürgerschaft der Deutschen Demokratischen Republik, 1982 GBl.I 418. Toman, *supra* note 137, at 276, 292, 306.

[167] *Multilateral Treaties*, *supra* note 95, at 116, 126.

[168] As to the meaning of "arbitrariness", *see supra* note 100 and accompanying text.

[169] M. Pellonpää, *supra* note 74, at 24.

[170] Partsch, *supra* note 162, at 246-49. The return of the Iberian peninsula to democracy brought many of the exiles back, the most prominent ones being Pablo Picasso and Pablo Casals. For Portugal, the Fourth Protocol to the European Convention on Human Rights became effective on November 9, 1978. 1979 BGBl.II 1040.

[171] Partsch, *supra* note 162, at 236 (referring to the Emergency Powers Act of 1939).

[172] 1970 BGBl.II 519.

[173] Partsch, *supra* note 162, referring to the decisions of the Conseil d'Etat in the cases of *Syndicat climatique de Briançon*, October 17, 1952 (Rec. 445) and *Solovieff*, February 10, 1954 (Rec. 656). *See also* Duverger & Sfez, *supra* note 44, at 578. The Fourth Protocol entered into force with respect to France on May 3, 1974, 1975 BGBl.II 1346.

as a "natural" right independent of the constitution; its exercise does not even require a passport or other travel document.[174] Such a right to return is also recognized in the legal systems of Norway[175] and Sweden.[176] In Denmark,[177] Belgium,[178] and Luxembourg,[179] this right is derived from general constitutional guarantees protecting individual freedom. In Switzerland, it is deduced from Article 45 of the Constitution of 1874, and is thus subject to the restrictions of that provision.[180] Austria[181] and Iceland[182] are parties to the Fourth Protocol. Express guarantees of the citizen's right to return are also included in the constitutions of Italy,[183] Malta,[184] Cyprus,[185] and Turkey.[186]

Before 1968 British nationals, the so-called "citizens of the United Kingdom and Colonies" under the 1948 British Nationality Act, had an unlimited right to enter the British Isles if they had availed themselves of a British passport.[187] As a result, legislative measures taken by the British Government in 1968 and 1971 to control the influx of certain "citizens of the United Kingdom and Colonies" from East Africa proved most controversial. Two statutes limited the entry of persons, in particular

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[174] Partsch, *supra* note 162, at 242.

[175] *Id.* at 246 (referring to § 1 of the Norwegian Immigration Act). The Fourth Protocol has been in force in Norway since May 2, 1968. 1968 BGBl.II 1109.

[176] *Id.* at 249 (arguing *e contrario* from the aliens legislation). The Fourth Protocol became effective in Sweden on May 2, 1968, as well. 1968 BGBl.II 1109.

[177] *Id.* at 222. Art. 71 of the Danish Constitution guarantees the "personal freedom" of its citizens. There, too, the Fourth Protocol entered into force on May 2, 1968. 1968 BGBl.II 1109.

[178] *Id.* at 218. Art. 7(1) of the 1831 Constitution protects "individual freedom." The Fourth Protocol entered into force in Belgium on September 21, 1970. 1970 BGBl.II 1068.

[179] *Id.* at 241. Art. 12 of the 1868 Constitution. The Fourth Protocol took effect on May 2, 1968. 1968 BGBl.II 1109.

[180] *Id.* at 251.

[181] 1970 BGBl.II 519.

[182] 1968 BGBl.II 1109.

[183] Partsch, *supra* note 162, at 238-39. Art. 16(2) of the 1949 Constitution grants the right to return "notwithstanding the obligations laid down by law"; interpretation of this provision has proven controversial. *Id.* at 239.

[184] *Id.* at 241-42 (reference to Art. 45(1) of the 1965 Constitution).

[185] *Id.* at 220-21. (Reference to Part II of the 1960 Constitution).

[186] Art. 18 of the 1961 Constitution. *See also* P. WEIS, *supra* note 4, at 45.

[187] R. v. Soon Gin An, [1941] 3 D.L.R. 125, 128 (B.C.); R. v. Brixton Prison Governor, *ex parte* Ahson, [1969] 2 All E.R. 347, 358.

those of Asian ethnic origin, who had maintained their British nationality after the independence of Kenya and Uganda, and who were now subject to severe deprivations and persecution under the new government's policy of "africanization."[188]

According to the 1968 Commonwealth Immigrants Act, the British immigration authorities were entitled to refuse entry to those citizens of the United Kingdom and Colonies who lacked certain ties to the United Kingdom.[189] The Immigration Act of 1971 cemented this distinction between first and second class citizenship by introducing a new category of members, so-called "patrials." "Patrials" were defined as those citizens of the United Kingdom and Colonies who had acquired the status by birth, adoption, naturalization or registration in the United Kingdom, on the Channel Islands or the Isle of Man, or further, those who had narrowly defined ties to the United Kingdom or the islands listed.[190] Only these persons had the "right of abode," as defined in Part I, 1.-(1) of the Act:

> All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

By way of statutory redefinition of status, the right to enter into their home state was taken away from more than a million British nationals; of those persons affected, approximately 35% had no other nationality.[191] The motivation behind this legisla-

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[188] *See* D. ROTHCHILD, CITIZENSHIP AND NATIONAL INTEGRATION: THE NON-AFRICAN CRISIS IN KENYA (Studies in Race and Nations No. 3 1970)(situation of Indians in East Africa); Plender, *The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects*, 19 AM. J. COMP. L. 287 (1971). The policy of "africanization" manifested itself, in particular, in immigration and trade licensing statutes that discriminated against foreigners. R. PLENDER, *supra* note 26, at 90.

[189] R. PLENDER, *supra* note 26, at 91. *See also* Hepple, *Commonwealth Immigrants Act 1968*, 31 MOD. L. REV. 424 (1968); Nambiar, *The Commonwealth Immigrants Act, 1968 — Effect on Asians in Kenya*, 8 INDIAN J. INT'L L. 56 (1968).

[190] P. WEIS, *supra* note 4, at 50.

[191] Partsch, *supra* note 162, at 255.

tion appears to have been racial prejudice[192] similar to the driving force behind the policy of africanization that had prompted the mass exodus. The citizens of the United Kingdom and Colonies of Indian origin resident in East Africa now found themselves universally unwanted; even India closed its doors to the migrants from Kenya.[193] India's reason, according to its Minister of Home Affairs, was to underscore to the British Government "the urgent necessity of allowing persons their rights of citizenship irrespective of the country of origin."[194]

Some such "British East Africa Asians" complained of a violation of the European Convention of Human Rights to the European Commission on Human Rights. The United Kingdom has not ratified the Fourth Additional Protocol to this Convention. Nevertheless, the Commission concluded that some articles of the Convention had been violated by the British acts.[195] The Council of Ministers of the Council of Europe was ultimately unable to agree on a joint recommendation and struck the case off its agenda.[196] The problem was solved on a political level by the admission of larger quotas of those British Asians in subsequent years.[197]

Although the British Government seems to reject an individual national's right of entry, it recognizes, at least verbally, its duty under international law to admit nationals expelled by another state.[198] In the meantime, the rift between the legal

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[192] B. HEPPLE, RACE, JOBS AND THE LAW (1968); *see also* I. MACDONALD, RACE RELATIONS AND IMMIGRATION LAW (1969)(discussion in the House of Commons).

[193] India's policy, however, allowed for exceptions if "compassionate circumstances" so demanded. R. PLENDER, *supra* note 26, at 91.

[194] The Times of India, March 7, 1968, at 1; *see also* Nambiar, *supra* note 189, at 60-61.

[195] *European Commission of Human Rights: Decision on Admissibility of Applications by East African Asians Against United Kingdom*, reported in 10 INT'L LEGAL MAT. 6 (1971).

[196] East African Asians v. United Kingdom, Res. DH (77) 2 of October 21, 1977. *See also* the criticism by Bartsch, *Die Entwicklung des Internationalen Menschenrechtsschutzes im Jahre 1985*, 1986 NJW 1379, 1388.

[197] M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 936 (1981).

[198] *See* the statements of the British Solicitor General in 759 H.C. DEBS., col. 1581; see also those of Lord Justice Orr in the *Thakrar* case, *supra* note 86 recognizing that "obligation is owed, not to the individual expelled, but towards all other states and is restricted to the receiving of a national who has nowhere else to go." *Id.* at 272. *But see*

treatment of "patrials" and that of "non-patrials" has widened. The former unitary status of a "citizen of the United Kingdom and Colonies" was split into three new categories of membership by the British Nationality Act of 1981: the "British citizenship," the "British Dependent Territories citizenship," and the "British Overseas citizenship."[199] Only "British citizens" have the "right of abode."[200] However, the United Kingdom remains obligated, under international law, to admit "British Overseas citizens" if they are expelled by their country of residence and fail to find a new place of residence.[201]

A significantly more generous attitude toward the claims of individuals is found in Israel. Against the backdrop of a common history of suffering, persecution and flight of the Jewish people,[202] the State of Israel has not only granted the right to enter to its nationals,[203] but to all the Jews in the world. According to Art. 1 of the 1950 Law of Return, any Jew is entitled to immigrate, to "return" to Israel.[204] These persons acquire Israeli na-

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the opinion expressed by Lord Denning, M.R. in the same decision stating "that rule does not apply when the home state is an outgoing country with far-flung commitments abroad, such as the United Kingdom has or recently did have." *Id.* at 266.

[199] *See* White & Hampson, *The BNA 1981 — Civitas in Tres Partes Divisa Est*, 1982 PUB. L. 6. Overall, the United Kingdom now may boast six different categories of membership. Besides the three mentioned, the status of a "British subject," of a "British protected person," and that of a "Commonwealth citizen" — all the outcome of Albion's colonial experience. On the British Nationality Act 1981, *see* Blake, *Citizenship, Law and the State: The British Nationality Act 1981*, 45 MOD. L. REV. 179 (1982); Dummett, *The New British Nationality Act*, 8 BRIT. J.L. & SOC'Y 233 (1981); MacDonald & Blake, *The New Nationality Law* (1982); White, Evans & Hampson, *Unsanguine Observations on the British Nationality Bill*, 131 NEW L.J. 328 (1981); Wooldridge, *The British Nationality Bill of 1981*, 5 TRENT L.J. 23 (1981).

[200] BNA 1981 § 39(2); L. FRANSMAN, BRITISH NATIONALITY LAW AND THE 1981 ACT, ch. 9 (1982).

[201] White & Hampson, *British Nationality Law — Proposed Changes*, 30 INT'L & COMP. L.Q. 247 (1981).

[202] *See* Lador-Lederer, *Jewry's Nationals*, 16 ISRAEL L. REV. 75-102 (1981)(special pleading for "international status" of Jews, of particular human rights of membership in community that transcends state boundaries, that acts through a recognized Jewish non-governmental organization as "substitute public agent").

[203] Israel's nationals, however, need a passport or a "laissez-passer" in order to return. Weis, *The Right to Leave and to Return in the Middle East*, 5 ISRAEL Y.B. HUMAN RTS. 322, 337 (1975).

[204] *See* the English translation of this statute as amended in 1954 and 1970 in M. GOULDMAN, ISRAEL NATIONALITY LAW 141 (1970). As to the problems arising under it, *see id.* at 9-10 and C. KLEIN, LE CARACTÈRE JUIF DE L'ETAT D'ISRAEL (1977).

tionality by the very act of immigration.[205]

The remainder of the states of the Middle East distinguish themselves by relatively harsh regulations for entry. Jordan, for one, requires a passport and a re-entry visa for returning nationals;[206] Lebanon[207] and Iraq[208] demand a passport. Art. 51 of the Egyptian Constitution of 1971 grants nationals a right of entry. A decree of 1959, however, still contains a list of "undesirable" persons who are denied the right of return. This list includes, *inter alia*, Jews who had left the country permanently.[209] Such a list also exists in Syria.[210]

Some African constitutions do expressly grant the right of entry.[211] In addition, Ghana recently gave a model response to the problem of a mass return of nationals.

On January 17, 1983, Nigeria ordered the expulsion and deportation of approximately two million foreign workers.[212] Roughly half were Ghanaan citizens. Unskilled laborers were given two weeks time to leave voluntarily; skilled workers could stay for a longer period. Ghana decided not to block the reflux.[213] By January 31, 1983, approximately 300,000 Ghanaan citizens had returned to their home country;[214] as of February 3, 1983, this number had risen to 900,000. This influx represented an increase of ten percent in Ghana's population within the span of a few days. The total number of returnees was to reach 1.2

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[205] Art. 2 of the 1952 Israel Nationality Act as amended in 1958 and 1968, reprinted in M. GOULDMAN, *supra* note 204, at 133. See the extensive discussions *id.* at 40, and in C. KLEIN, *supra* note 204, at 83.

[206] Weis, *supra* note 203, at 342. *See also* P. WEIS, *supra* note 4, at 45.

[207] Weis, *supra* note 203, at 345.

[208] *Id.* at 331. Art. 24 of the 1970 Interim Constitution of Iraq grants a right of entry, subject, however, to unlimited restrictions by law ("except in cases defined by law"). Weis, *supra* note 203, at 329.

[209] *Id.* at 326.

[210] *Id.* at 346.

[211] Constitutions expressly granting the right of entry are those of Kenya (Art. 25(d)), Yemen (Art. 27 of the 1970 Interim Constitution), and Kuwait (Art. 27 of the 1962 Constitution). P. WEIS, *supra* note 4, at 45.

[212] Policy reasons underlying this move were the worldwide drop of oil prices, internal politics (President Shagari aspired to be reelected in the fall of 1983, an ultimately unsuccessful bid) and xenophobia. *A Docile and Somber Exodus*, N.Y. Times, Feb. 3, 1983, at A12, col. 3.

[213] *Ghana Admits Its People from Nigeria*, N.Y. Times, Jan. 30, 1983, at A3, col. 4.

[214] *300,000 Said to Cross Togo Into Ghana*, N.Y. Times, Feb. 1, 1983, at A3, col. 1.

million people, making this the largest mass expulsion in Africa's modern history. The Government of Ghana had to import 126,000 tons of grain in order to feed its people — a country in economic depression, with chronic unemployment, and under a military regime that had difficulties, even prior to the mass return, fulfilling the subsistence needs of the population.[215] Despite all these problems, this Government, just as the ruling elites in other states of the region (Mali, Chad, Niger, Upper Volta, Benin and Togo) complied with its duty under international law and admitted its citizens.

Canada, as well as her North American neighbor, grants a right of entry. The Court of Appeal of British Columbia recognized this right in a landmark decision that was binding throughout the United Kingdom prior to the enactment of the Commonwealth Immigrants Act of 1968.

> If the applicant was fortunate enough to have been born in Canada, then indeed he is possessed of a very precious heritage of which he is not lightly to be deprived. One of the rights that flow from his Canadian citizenship is the right to return to his native land.[216]

In Latin American countries such as Chile and Paraguay, there are instances where nationals affiliated with the political opposition have been banished. In terms of intensity, however, these acts go beyond mere denials of entry or return after residence abroad. In the latter cases, to be dealt with in this part of the study, the individual affected had already loosened its relationship to the home state by moving abroad. Cases of banishment will be treated in the next section.

A recent example of denial of reentry after a voluntary stay abroad occurred in Nicaragua. En route to Nicaragua after a visit to France, the speaker of the Roman Catholic Church in Nicaragua, Monsignor Bismarck Carballo, was told in Miami that the Sandinista Government had asked air carriers not to allow him to board any flight to Nicaragua.[217] Most recently, the

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[215] *At a Homecoming in Ghana: No Rooms, No Jobs and Much Worry*, N.Y. Times, Feb. 4, 1983, at A4, col. 3.

[216] R. v. Soon Gin An, [1941] 3 D.L.R. 125, 128 (B.C.).

[217] *U.S. Criticizes Sandinistas for Barring Return of Priest*, N.Y. Times, July 1,

country's Minister of the Presidency, René Nunez Tellez, announced that Nicaragua would not object to the return of Father Carballo, and that of banished Bishop Pablo Vega, "so long as they obey the law;" and on September 12, 1987, Bismarck Carballo returned to Managua.[218]

A mass denial of the right to return took place after the more or less voluntary arrival, in 1980, of 125,000 Cuban nationals in Miami, via the so-called "Mariel boat lift." When the United States requested Cuba to take back the criminal and insane elements of the group, the Cuban Government refused. In December 1984, both countries agreed on an orderly, protracted return of these *marielitos*.[219] When the United States started to broadcast into Cuba via Radio Marti in May of 1985, Cuba's leader Castro suspended this agreement. This leaves thousands of Cuban nationals indefinitely detained in the United States.[220]

C. *Conclusion*

As a result of this *tour du monde* one may conclude that, in very rare instances of crisis, states still employ means of denying entry to nationals. There is, thus, no unqualified right of entry for nationals. However, in conformity with widely accepted human rights agreements, one discerns an overwhelming trend toward recognition of a right of nationals to enter their home territory except in cases of public emergencies which threaten

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1986, at A3, col. 1.

[218] *Nicaragua to allow reopening of station*, Miami Herald, Feb. 12, 1987, at 24A, col. 2-3; *Exiled Priests, Back in Managua, Call for New Conciliatory Steps*, Miami Herald, Sep. 14, 1987, at 11A, col. 1.

[219] *Cuba-United States Agreement on Immigration Procedures and the Return of Cuban Nationals, Dec. 14, 1984*, 24 INT'L LEGAL MAT. 32 (1985).

[220] The indefinite detention of Cuban aliens in itself creates legal problems. *Cf.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) which holds that, "When an excludable alien in custody tests the detention by writ of habeas corpus . . . the burden is upon the government to show that the detention is still temporary pending expulsion . . . ." *Id.* at 1390, *with* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986) stating that "even an indefinitely incarcerated alien 'could not challenge his continued detention without a hearing.'" *Id.* at 1455. *See generally*, Note, *Statutory and Constitutional Limitations on the Indefinite Detention of Excluded Aliens*, 553 B.U.L. REV. 553 (1982). As to the medical and psychological effects of longterm detention of asylum seekers, see the study by Hennig in LAGER UND MENSCHLICHE WÜRDE 19, 62 (C. Hennig & S. Wiessner eds. 1982).

the life of the nation. This trend evidences the current content of customary international law in the area.

Therefore, the first two transnational legal consequences of nationality, establishing a substantive legal link between nationality and territory, are: (1) a state has to admit its nationals if no other state is willing to accept them; (2) a national has a right of entry into his home state unless there is a public emergency that threatens the existence of the nation. The denial of entry must be strictly required by the exigencies of the situation.

IV. Voluntary Departure

In the "antithetical relationship"[221] of migration, the tension between immigration and emigration, we are now looking at the second element, emigration, defined as the voluntary leaving of a country's territory. In this area, too, there may be important differences in the legal treatment of foreigners and nationals.

Just as the perceived legitimacy of immigration has varied significantly with time and culture, the history of emigration oscillates between more and less restrictive phases. For example, Plato suggested severe restrictions with respect to travels of citizens abroad. Such trips were to be rewards for senior citizens whose loyalty to the community was beyond any doubt. They could only be undertaken upon prior permission, under supervision by the Government, and structured as a semi-official delegation obligating participants to relate their experience abroad upon return.[222] To this extent, the philosopher adhered to the restrictive attitude of Sparta, one essentially shaped by Lycurgus: Spartans were prohibited from travelling abroad and from becoming acquainted with foreign morals, with the customs of uncivilized people, and with differing views concerning the proper function of government. In essence, Sparta attempted to prevent the infection of its citizens by "bad" foreign practices.[223] This contrasts sharply with the *Crito* dialogue, according to

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[221] *See* Dürig, *supra* note 25.

[222] Plato, *The Laws* §§ 950-52, in 2 The Dialogues of Plato 684-87 (transl. B. Jowett 1937); Whelan, *Citizenship and the Right to Leave*, 75 Am. Pol. Sci. Rev. 636, 643 (1981).

[223] Whelan, *supra* note 222, at 643.

which the Laws tell Socrates that no law prohibits a citizen to "go wherever he wishes and take whatever is his."[224]

Rome offered previously unknown freedom of movement both *de facto* and *de jure*. Roman law circumvented the problem of not expressly granting the right to leave by assuring citizens an absolute freedom to retain the *civitas Romana* or to renounce it.[225]

Section 42 of the original version of the Magna Carta granted each person the right to leave the Kingdom "saving his allegiance to us."[226] This clause "salva fide nostra" meant that the vassals who had sworn loyalty to the King, and subsequently all the subjects under the feudal concept of "allegiance," were not allowed to evade their duties in feudal society by moving abroad.[227] This enumerated right to leave under § 42 was deleted in subsequent versions of the Magna Carta, but its basic ideas still prevail in the classical formulation of the common law:

> By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home: . . . but because that every man ought of right to defend the king and his realm, therefore the king, at his pleasure, may command him by his writ that he go not beyond the seas, or out of the realm, without license.[228]

This constitutes a right to leave, but not a right to emigrate, as Blackstone clarified with reference to the doctrine of "perpetual allegiance."[229]

Grawert has referred to a Germanic principle of freedom of

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[224] PLATO, *Crito*, in GREAT DIALOGUES OF PLATO 446, 456 (trans. W. Rouse 1956).

[225] CICERO, *Pro Balbo*, in THE SPEECHES 665 (1958): "[T]he unshakable foundations of our liberty are that each one of us has the absolute power of retaining or of renouncing his right of citizenship."

In view of the increasingly cosmopolitan character of the Roman Empire and the corresponding decrease of the relevance of citizenship, the renunciation of Roman citizenship did not severely affect the status of an individual.

[226] For full text, *see supra* note 27, and accompanying text.

[227] Whelan, *supra* note 222, at 640-41.

[228] W. BLACKSTONE, *supra* note 32, at 265, 134, 137.

[229] Whelan, *supra* note 222, at 645. *Compare with* R. GRAWERT, *supra* note 2, at 233 (naturalization conflict between Britain and the United States).

migration,[230] and Dürig to the first quasi-constitutional treaty codifying it, the Tübingen Treaty of 1514.[231] The Augsburg Treaty of Religious Peace of 1555 granted a right to emigrate (*jus emigrationis*) for religious reasons.[232] The right to leave was expressly granted in the 1919 Weimar Constitution of the German Reich.[233]

Current international law addressing the right to leave essentially follows an 1897 recommendation of the Institute of International Law. According to this opinion, the right to emigrate should be granted without distinction as to nationality.[234] Thus, Article 13(2) of the Universal Declaration of Human Rights, under the broad reservation of Article 29(2),[235] formulates the right to leave as a human, rather than citizen's right: "*Everyone* has the *right to leave any country, including his own,* and to return to his country." [emphasis added].

Article 12(2) of the 1966 United Nations Covenant on Civil and Political Rights[236] has the same scope of application *ratione*

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[230] R. GRAWERT, *supra* note 2, at 94.

[231] *Reprinted in* GESETZE DES LANDES BADEN-WÜRTTEMBERG, Anhang No. 1 (G. Dürig ed. 1980).

[232] Before this right could be exercised, however, bondage had to be paid off and taxes had to be remitted. Both obstacles were removed only centuries later, by Markgraf Karl Friedrich of Baden in 1783, by Stein's Edict, with respect to Prussia, in 1807, and in Bavaria in 1808. Dürig, *supra* note 152, Annot. 14.

[233] Art. 112 (1) and (2).

[234] Principes recommandés par l'Institut, en vue d'un projet de convention en matière d'émigration, September 1, 1897, Art. 1: "Les Etats contractants reconnaissent la liberté d'émigrer et d'immigrer aux individus isolés ou en masse, sans distinction de nationalité . . . ."

INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉSOLUTIONS (1873-1956) 45 (1957).

[235] For text, *see supra* note 92.

[236] Article 12(3) allows broad limitations to this right: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

As to the interpretation of this provision, compare Jagerskiold, *supra* note 99, at 166, 177-83.

The 1986 Strasbourg Declaration on the Right to Leave and Return (for details, *see supra* at note 100) makes a most useful effort towards a narrow construction of this limitative provision. It provides, *inter alia*, in Article 4:

> c) A restriction shall be considered "necessary" only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate

personae: "Everyone shall be free to leave any country, including his own."

Article 2(2) of the Fourth Additional Protocol to the European Convention on Human Rights,[237] Article 22(2) of the Inter-American Human Rights Convention,[238] and Article 12(2) of the Banjul Charter[239] are structured quite similarly.

What are the administrative strictures, passport regulations and governmental controls that may justifiably limit the exercise

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to that aim.

d) A restriction based on "national security" may be invoked only in situations where the exercise of the right poses a clear, imminent and serious danger to the state. When this restriction is invoked on the ground that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

e) A restriction based on "public order (ordre public)" shall be directly related to the specific interest which is sought to be protected. "Public order (ordre public)" means the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.

f) A restriction based on "the rights and freedoms of others" shall not imply that relatives (except for parents with respect to unemancipated minors), employers or other persons may prevent, by withholding their consent, the departure of any person seeking to leave a country.

g) No fees, taxes or other exactions shall be imposed for seeking to exercise or exercising the right to leave a country, with the exception of nominal fees relating to travel documents.

h) Permissibility of restrictions on the right to leave is subject to international scrutiny. The burden of justifying any such restriction lies with the state.

81 AM. J. INT'L L. 434, 435-36 (1987).

[237] "Everyone shall be free to leave any country, including his own."
The limitations to this right are enumerated in Art. 2(3):
No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of "ordre public", for the prevention of crime, for the protection of the rights and freedoms of others."

[238] "Every person has the right to leave any country freely, including his own."
The possible restrictions are listed in Art. 22(3):
"The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."

[239] "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."

of the right to leave under these agreements? A student of the 1966 Covenant on Civil and Political Rights reaches the following conclusion:

> Generally, travel documents such as a passport may be required for individuals to leave a country. If documents are required, a state must make them available at a reasonable cost and within a reasonable time. The refusal to issue travel documents is permissible only in those special circumstances in which the individual's right to travel may be restricted.[240]

In any event, the provisions of the aforementioned treaties do not differentiate between citizens and non-citizens. Accordingly, a thorough analysis is required in order to determine whether domestic laws and regulations discriminate between nationals and aliens with respect to the right to leave.

A. United States of America

In the United States, § 215(a) of the Immigration and Nationality Act allows the departure of aliens "under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."[241] Implementing regulations prohibit the departure of foreigners who might endanger U.S. national security, who have not complied with their duty of registration under the Universal Military Training and Service Act (if applicable), of fugitives from justice and witnesses in court proceedings and other official inquiries, as well as of other aliens whose departure is deemed prejudicial to the interests of the United States.[242] A provision of the Internal Revenue Code[243] mandates that an alien may only leave the United States if he has established, by submitting a certificate of the Department of the Treasury ("sailing permit"), that he has complied with all of his obligations under the U.S. income tax laws. This provision will not be enforced only if the deadline for payment of such taxes has not passed and an appropriate agent of

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[240] Jagerskiold, *supra* note 99, at 179-80.

[241] 8 U.S.C. § 1185(a)(1) (1982).

[242] Control of Aliens Departing From the United States, 22 C.F.R. § 46.3 (1987).

[243] 26 U.S.C. § 6851(d)(1) (1982).

the Treasury Department determines that departure of the alien will not impair collection of the taxes.[244]

In order to leave the United States, United States citizens need a valid passport.[245] However, the federal government may not indiscriminately abuse this requirement to impair the ability of United States citizens to travel abroad. In 1957, the United States Supreme Court stated: "The right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment."[246]

And in 1964, the Court held that the denial of a passport to a Communist was unconstitutional.[247] In a concurring opinion, Justice Douglas wrote:

> Freedom of movement, home and abroad, is important for job and business opportunities — for cultural, political, and social activities — for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.[248]

One year later, however, the Supreme Court upheld the refusal of the United States Government to validate a U.S. passport for travel to Cuba. Chief Justice Warren wrote:

> It must be remembered . . . that the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations . . . . In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather be-

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[244] *Id.* § 6851(d)(2).

[245] 8 U.S.C. § 1185(b) (1982).

[246] Kent v. Dulles, 357 U.S. 116, 125 (1957).

[247] Aptheker v. Secretary of State, 378 U.S. 500 (1963). The *Aptheker* court ruled that a provision of the Subversive Control Act of 1950, 50 U.S.C. § 785 (6), which denied issuance of a passport to a Communist Party member, "[swept] too widely and too indiscriminately across the liberty guaranteed in the fifth amendment." *Aptheker*, 378 U.S. at 514.

[248] *Id.* at 519-20.

cause of foreign policy considerations affecting all citizens.[249]

Three years later, the United States Supreme Court reversed the conviction of a U.S. citizen for conspiracy to travel to Cuba because of the limited wording of § 215(b) of the Immigration and Nationality Act, not because of his constitutional right to travel.[250]

In 1977, President Carter lifted the restrictions on U.S. citizens' travel to Cuba.[251] The curbs were reintroduced by President Reagan in 1982,[252] and upheld by the U.S. Supreme Court in 1984.[253]

Previously, the U.S. Supreme Court had not only sanctioned the refusal to issue a U.S. passport in certain cases, but also the withdrawal of a passport already issued.[254] The case involved the former CIA agent Philip Agee who had gained prominence abroad by disclosure of the activities and identities of his former colleagues. The 1926 Passport Act had granted the State Department the power to issue passports under regulations issued by the President.[255] These regulations allow the denial and the

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[249] Zemel v. Rusk, 381 U.S. 1, 13 (1965). The restrictions on travel to Cuba were imposed in 1963 by a Presidential embargo under the Trading with the Enemy Act of 1917, 50 U.S.C. App. § 1, and the Cuban Assets Control Regulations, 31 C.F.R. § 515 (1963). Such restrictions on travel abroad also applied to the People's Republic of China until 1971. Currently, besides Cuba, the restrictions also apply to North Korea, North Vietnam, South Vietnam and Cambodia. 31 C.F.R. § 500.201 (1987). These restrictions are also imposed on certain aliens. For example, permanent resident aliens need prior permission before undertaking such travel. Prior to travelling to Eastern Europe, they must procure re-entry permits to the U.S. D. CARLINER, THE RIGHTS OF ALIENS 74 (1977).

[250] United States v. Laub, 38 U.S. 475, 481 (1967). *See also* Worthy v. United States, 382 F.2d 386, 394 (5th Cir. 1964)(involving illegal travel to Cuba).

[251] Regulation 560, 42 Fed. Reg. 16621 (1977).

[252] Amendment of Regulation 560, 47 Fed. Reg. 17030, 32060 (1982). Exceptions may be made "for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities." 31 C.F.R. § 515.560(b) (1987).

[253] Regan v. Wald, 468 U.S. 222 (1984)(5-4 decision). The majority opinion, written by Justice Rehnquist, affirmed the derivation of the President's authority from a provision of the International Emergency Economic Powers Act of 1982, § 102(b), 50 U.S.C. App. § 5, which replaced, for times of peace, the Trading with the Enemy Act. The decision also reaffirmed the classical restraint of the U.S. Supreme Court in matters of foreign policy. Tribe's fervent criticism of this decision attributes to the majority a "managerial mentality;" this was not a "small, technical case," but an "assault on Kent v. Dulles . . . and on the individual's freedom of travel." 53 U.S.L.W. 2194 (1984).

[254] Haig v. Agee, 453 U.S. 280 (1981).

[255] 22 U.S.C. § 211(a) (1982).

revocation of a passport if the Secretary of State "determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[256]

Distinguishing *Kent*, the majority stated that the applicant's conduct, not his beliefs, was the decisive factor for the denial of the passport. Accordingly Agee's activities abroad were deemed a serious threat to U.S. employees abroad as well as to national security.[257] The *freedom* to travel outside the United States was distinguished from the *right* to travel within the United States. Whereas the constitutional right to travel within the United States was subject to virtually no restraints, the "right" to international travel was nothing more than an aspect of the freedom protected by the due process clause of the fifth amendment. For this reason, the latter could be regulated within the limits of due process.[258] No governmental interest was of a higher rank than the security of the nation. In addition, the protection of the foreign policy of the country was a governmental interest of great importance. Measures designed to protect the secrecy of United States intelligence operations obviously served to protect both of these interests and were thus justified.[259]

This distinction between the "freedom" to travel abroad and the right to travel within the U.S. was reaffirmed in a footnote in Justice Rehnquist's 1984 majority opinion in *Regan v. Wald*.[260]

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[256] Passports, 22 U.S.C. §§ 51.70(b)(4), 51.71(a) (1987).

Haig v. Agee, 453 U.S. 280 (1981).

[257] *Haig*, 453 U.S. at 304-06.

[258] *Id.* at 306-07.

[259] *Id.* at 307. Brennan criticized the decision by stating:

> [J]ust as the Constitution protects both popular and unpopular speech, it likewise protects both popular and unpopular travelers . . . . In permitting the Secretary to stop this unpopular traveler and critic of the CIA, the Court professes to rely on, but in fact departs from, the two precedents in the passport regulation area, *Zemel* and *Kent*. Of course it is always easier to fit oneself within the safe haven of *stare decisis* than boldly to overrule precedents of several decades' standing. Because I find myself unable to reconcile those cases with the decision in this case, however, and because I disagree with the Court's *sub silentio* overruling of those cases, I dissent.

Id. at 319-20 (Brennan, J., dissenting).

[260] Regan v. Wald, 468 U.S. 222 (1984).

Comparing statutes, regulations, and case law one may conclude that there is no major difference with respect to U.S. citizens' and aliens' right to leave with the exception of the restrictions on travel to certain countries; the reservation as to national security applies to both.

B. USSR

An alien with a valid foreign passport may be prohibited from leaving the USSR, if:

> 1. there are grounds for bringing him to criminal responsibility, until the proceedings in the case end;
> 2. he had been sentenced for the commission of a crime, until the sentence has been served or he is relieved from punishment;
> 3. his exit is contrary to the interests of ensuring state security, until the effect of circumstances preventing exit ceases;
> 4. there are other grounds preventing exit established by USSR legislation.
> Exit of a foreign citizen from the USSR may be postponed until he has executed financial duties with which essential interests of USSR citizens and other persons, state, cooperative, or other organizations are linked.[261]

As to a Soviet citizen's right to leave, a marked gap has been observed between the "law in the books" and the "law in action." The Statute on Entry Into the USSR and Exit From the USSR of September 22, 1970[262] prescribes in predominantly procedural terms:

> In *Kent*, 357 U.S., at 126-27, the constitutional right to travel within the United States and the right to travel abroad were treated indiscriminately. That position has been rejected in subsequent cases. *See* Haig v. Agee, 453 U.S. 280, 306 (1981) ("the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States") . . . .

Regan, 468 U.S. at 241 n.25.

[261] Law on the Legal Status of Foreign Citizens in the USSR, June 24, 1981, *supra* note 60, Art. 25. As in most other countries, foreigners temporarily present in the USSR are also obligated to leave this country upon expiration of their allowed time of stay. *Id.* at Art. 5.

[262] *See supra* note 130. The provisions quoted have not changed under the August 26, 1986 amendments.

> 5. Soviet citizens shall be permitted to leave the Union of Soviet Socialist Republics on valid documents of the types listed in paragraph 8(a)-(d) of these Regulations.
>
> . . . .
>
> 8. In order to leave the USSR, reside abroad and re-enter the USSR, a citizen of the Union of Soviet Socialist Republics may be issued with:
> (a) a diplomatic passport;
> (b) an official passport;
> (c) a seaman's passport;
> (d) a civil passport. . . .
>
> . . . .
>
> 16. Civil passports shall be issued to Soviet citizens other than those listed in paragraphs 13-15 of these Regulations [i.e. holders of diplomatic, official and seaman's passports] travelling abroad on official, public or private business, and to Soviet citizens permanently resident abroad.[263]

According to an official communication delivered by the USSR to the United Nations General Assembly in 1963, only persons charged with a criminal offense, prisoners, and conscripts who had not yet complied with their obligation to serve in the armed forces were excluded from leaving the USSR.[264]

However, local authorities had the authority to pass upon applications for passport and exit visas. They enjoyed wide discretion, employed primarily to deny the application, and justified partially with reference to internationally recognized grounds such as the threat to national security, public order, and so forth.[265] In 1975, a recognized legal scholar concluded as to the "living law" in the USSR:

> Decisions on petitions are made in an arbitrary way, since the applicant does not know what criteria determine acceptance or refusal, and sometimes applications containing the same data

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[263] SP SSSR 1970 no. 18 item 139 (authoritative English translation in U.N. Doc. E/CN.4/1098/Add.25, at 33-36 (Jan. 9, 1974)).

[264] Conference Room Paper No. 85/Rev. 1 (February 7, 1963), cited in Pettiti, *The Right to Leave and to Return in the USSR*, 5 ISRAEL Y.B. HUMAN RTS. 264, 267 (1975).

[265] *Id.* at 271. "The usual grounds officially given for refusing an exit visa (public order, etc.) are in theory universally recognized and compatible with international law." *Id.*

> are decided differently.
>
> Criteria of refusal seem to vary according to the background of the individual petitioner, the Republic and the national minority concerned.
>
> In certain cases, some Republics use conscription into the Army as a means to hinder the petition. Persecution and harassment are often employed to intimidate applicants.
>
> An exit permit is refused in many cases where no pretext of acts contrary to public order can be applied in regard to a particular applicant.
>
> . . . .
>
> Obviously, the Soviet Union is not the only country in the world which does not implement the right of every person to emigrate. But nowhere else, perhaps, is the problem so glaring. And nowhere else is there such a gap between official statements and actual practice.[266]

In keeping with a recent Soviet trend toward statutorification and the narrowing of administrative discretion, the 1970 Statute on Entry and Exit was amended on August 26, 1986 by adding substantive guidelines on the "Consideration of Applications Concerning Entry into the USSR and Exit from the USSR."[267] The first was an anti-discrimination provision, Article 20:

> Entry into the USSR and exit from the USSR on personal business may be performed by Soviet citizens, foreign citizens, and stateless persons irrespective of their origin, social and property status, racial and national affiliation, sex, education, language, and attitude toward religion.[268]

The provision has been interpreted abroad as ending the preference given to Jews, ethnic Germans and Armenians.[269] The

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[266] *Id.* at 274-75. Referring to semiannual reports on the implementation of the Helsinki Accord issued by the U.S. Department of State, Ginsburgs also concludes that "the Soviet government does not recognize the general right of its citizens to emigrate and that those who apply 'often find the process costly, lengthy, complicated, arbitrary, and uncertain in its results,' plus occasionally fraught with personal hardship due to official penalization of attempts to emigrate." G. GINSBURGS, *supra* note 134, at 376.

[267] *Union of Soviet Socialist Republics: Statute on Entry Into the USSR and Exit From the USSR*, 26 INT'L LEGAL MAT. 425 (1987).

[268] *Id.* at 429.

[269] *Law on Emigration in Effect in Soviet*, N.Y. Times, Jan. 2, 1987, at A5, col. 1.

new law defines the term "personal business" as including the applicants' "reunification with members of their family, meeting with close relatives, conclusion of marriage, visiting gravely ill relatives, visiting burial places of close relatives, resolving questions concerning an inheritance, and other important reasons."[270]

The most important emigration ground is family reunification. Previously used broadly to permit Soviet citizens to join relatives abroad, often distant or even fictitious kin, this ground is narrowed by the new law. Article 24 limits "family" to close relatives. It requires

> the submission of an invitation of a husband, wife, father, mother, son, daughter, natural brother, or natural sister certified by the competent authorities of the foreign State.[271]

The U.S. State Department estimates that only 30,000 to 40,000 will be eligible to leave under the new law.[272]

Even if such grounds exist in a particular situation, exit may still be refused. Article 25 provides:

> Exit from the USSR on personal business shall not be authorized for a citizen of the USSR if:
> (a) he has acknowledge of State secrets or other reasons affecting State security until termination of the effect of the circumstances which prevent exit;
> (b) this in and of itself entails derogation of the material rights and legal interests of other citizens of the USSR;
> (c) he has not fulfilled obligations to the State or financial duties with which are connected material or legal interests of State, cooperative, or other social organizations until these obligations and duties are performed;
> (d) there are legal grounds for bringing him to criminal responsibility until the proceedings in the case are completed;
> (e) he has been convicted of the commission of a crime until

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During the Brezhnev era of 1969 to 1979, 260,000 Jews were permitted to leave the Soviet Union as an exception to the general curbs on emigration. According to the National Conference on Soviet Jewry, this flow reached a peak of more than 51,000 in 1979, but dropped to 914 in 1986. *Id. See also* G. GINSBURGS, *supra* note 134, at 60.

[270] 26 INT'L LEGAL MAT. 430 (1987).

[271] *Id.*

[272] N.Y. Times, *supra* note 269.

punishment is served or until relief from punishment;
(f) if it is established that the inviting person is abroad in violation of the procedure for exit from the USSR or sojourn abroad until these circumstances are settled.
Exit from the USSR on personal business may not be authorized for a citizen of the USSR;
(a) in the interests of ensuring the protection of public order, health, or morality of the populace until termination of the effect of the circumstances which prevent exit;
(b) if during a preceding sojourn abroad he committed actions violating the interests of the State or facts of the violation by him of customs or currency legislation have been established;
(c) if he has communicated false information about himself when filing an application concerning exit.[273]

Compared with the grounds for refusing a foreigner's request to leave as found in Article 25 of the 1981 Law on the Legal Status of Foreign Citizens in the USSR, Soviet citizens desiring to leave confront the added burdens of being considered risks to State security (a) and the "illegality" of the inviting person (f) — grounds for mandatory refusal — as well the broad grounds (a) through (c) for optional refusal.

One may conclude that there are major differences with respect to the right to leave as applied to foreigners and citizens in the USSR. This right is granted to foreign citizens as a rule. Soviet citizens, on the other hand, are accorded this right only in exceptional cases making headlines in the Western press.

C. Federal Republic of Germany

The Basic Law does not expressly list the right to emigrate. Similar to the Weimar Constitution of the German Reich, however, this right is granted in the constitutions of a majority of the West German federal states (*Länder*).[274] Contrary to a widespread scholarly view, the Federal Constitutional Court held that the freedom to leave the Federal Republic is not included

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[273] 26 INT'L LEGAL MAT. 431 (1987).

[274] *See* The 1946 Constitution of Bavaria (Art. 109(2)), the 1947 Constitution of Bremen (Art. 18), the 1947 Constitution of Saarland (Art. 9(2)), and the Constitutions of Hesse (Art. 6) and Berlin (Art. 11).

in the freedom of movement protected by Article 11 of the Basic Law.[275] As a result, the freedom to leave is not restricted to Germans, and it can be constricted by all valid legal norms in the interests of morality and by the rights of others.

Such restrictions have been established for foreigners by Article 19 of the Aliens Act:

> (1) Aliens may depart freely.
> (2) The departure of an alien may be prohibited if he
> 1. constitutes a threat to the security of the Federal Republic of Germany;
> 2. intends to evade criminal prosecution or execution of punishment, the ordering or execution of a measure of rehabilitation or the prosecution of an administrative offense or the execution of a fine;
> 3. violates a provision of the tax laws, including the laws of customs and monopolies or the laws on business abroad or the prohibitions of or restrictions on importation, exportation, and transit;
> 4. intends to evade liabilities for maintenance;
> 5. intends to evade a public service duty.
>
> The order prohibiting departure shall be lifted as soon as the reasons for it cease to exist.[276]

Germans have to show a passport when leaving (as well as entering) the Federal Republic. Art. 7 of the Passport Act lists the grounds for denying this document:

> (1) The passport is to be denied, if facts justify the assumption that:
> (a) the applicant, as holder of a passport, constitutes a threat to the internal or external security of the Federal Republic of Germany or of a German Land;
> (b) the applicant intends to evade criminal prosecution or the execution of sentences pending against him inside the Federal Republic of Germany;

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[275] *Elfes* Case, BVerfGE 6, 32, at 41-42. For an opposing scholarly opinion, *see* Dürig, *supra* note 25, at 519, with further references; *see also* H. v. MANGOLDT & F. KLEIN, *supra* note 158, Annot. III.2. Kunig considers the inclusion of the right to leave into the right to move freely as "desirable." Kunig, *supra* note 152, Annot. 29.

[276] Ausländergesetz, *supra* note 59 [author's translation].

(c) the applicant intends to evade his obligations under the tax laws or to violate or circumvent the laws on customs and protection of the currency;
(d) the applicant intends to evade a statutory liability for maintenance;
(e) the applicant intends to enter into the services of a foreign army without authorization.
(2) The passport is to be denied, further, if
(a) the applicant does not comply with a request according to § 6(2) [proof of status as a German] within a reasonable period of time;
(b) in the case of unmarried minors, there is no consent of the legal representative to the issuing of the passport.[277]

These grounds are exhaustive. If an enumerated ground for refusal does not exist in a given case, a German has a right to be issued a passport.[278] In the case of conscripts special provisions apply. The law requires them to secure permission for trips abroad which exceed three months.[279] In addition, active-duty civil servants, judges and soldiers lose that status by relocating abroad permanently. Finally, the Emigration Act of 1897 prohibits the departure of persons wanted by an arrest warrant, or of certain witnesses in court proceedings, or of persons who have been lured to emigrate by financial promises or other dubious means.[280]

Essentially, therefore, foreigners experience similar restrictions upon their right to leave as do Germans. Nationality provides no grounds for discrimination with respect to voluntary departure from the Federal Republic of Germany.

The great majority of other legal systems also grant rights

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[277] Section 1 of the Passport Act of March 4, 1952, *supra* note 161 [author's translation]. *See also* exemptions listed in §§ 3-5.

[278] P. Ruidisch, Einreise, Aufenthalt und Ausweisung im Recht der Bundesrepublik Deutschland 9 (1975), with further references.

[279] Dürig, *supra* note 152, Annot. 109. Everybody whose call to armed service duty is not imminent is entitled to receive that permission. Even if such permission is not granted, the persons concerned may not be legally prevented from crossing the border. A violation of the duty to obtain prior permission is sanctioned only by a fine. *Id.* at Annot. 110.

[280] Partsch, *supra* note 162, at 233-234.

to leave *sans distinction de nationalité.*[281]

D. Conclusion

For these reasons, neither international law nor a majority of the domestic legal systems attribute an essential, differentiating role to the concept of nationality in the context of legal regulation of voluntary departure. In conclusion, the freedom to leave a territory does not constitute a fundamental or distinguishing feature of nationality.

V. Involuntary Departure

The empirical context of this action is to be defined as a person's involuntary leaving of a state's territory due to the government's order. If this person is a foreigner, the government's act is commonly called "expulsion" or "deportation;" if he or she is a national, the usual term is "banishment."[282]

In antiquity,[283] as well as in the context of still existing tribal societies,[284] banishment was, and is, considered the worst kind of punishment,[285] less bearable than death. In 1915,

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[281] As to Austria, *see* Partsch, *supra* note 162, at 216-18; Belgium, at 218-19; Cyprus, at 220-22; Denmark, at 222-25; Finland, at 225-27; France, at 227; Ireland, at 236-38 (Partsch, however, overlooked that as of October 29, 1968, the Fourth Additional Protocol to the European Human Rights Convention has been in force in the Irish Republic, *see supra* note 172); Italy, at 238-41; Luxembourg, at 241; Malta, at 241-42; Netherlands, at 242-45; Norway, at 245-46; Portugal, at 246-47 (however, the Fourth Additional Protocol became effective November 9, 1978; 1979 BGBl.II 1040); Spain, at 247-49; Sweden, at 249-50; Switzerland, at 250-53; Turkey, at 253-54; United Kingdom, at 254.

However, different are laws and practices in the Eastern bloc. In the GDR, for example, the issuing of passports to citizens is in the unlimited discretion of the authorities; no reasons need to be stated for the denial of passports, and the unauthorized departure from GDR territory is penalized severely. Partsch, *supra* note 162, at 230. As to the practices of other Eastern European countries, *see* Toman, *supra* note 137, at 276.

[282] *See generally*, E. Borchard, The Diplomatic Protection of Citizens Abroad 710 (1915)(discussion of banishment).

[283] *See* H. van Panhuys, *supra* note 84, at 41: "The journey to foreign countries was to the religious conceptions of antiquity the same as the soul's journey to the realm of the dead, i.e. to a totally different world. Hermes was worshipped not only as the god of commerce but also as the god who escorted the shade to Hades." *Id.*

[284] L. Pospisil, Kapauku Papuans and Their Law 246 (1958).

[285] *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.").

Borchard stated that banishment was virtually abolished.[286] Similarly, in the mid-60's a United Nations Committee found that "[e]xile has virtually disappeared."[287] A closer look at whether the facts support this conclusion follows.

Leibholz supported this finding by the seemingly logical legal argument that no state can force other states to admit its nationals.[288] Lessing, too, classifies the prohibition of banishment as a state's duty of omission under international law.[289]

There were, however, scholars in the first half of this century who took a closer look at state practice and derived exceptions to the general rule forbidding banishment. These authors considered banishment in "political" cases a legitimate instrument of the ultimate authority of ruling elites.[290] Examples are the banishment of royal dynasties after World War I: members of the House of Habsburg-Lorraine by the newly-established Republic of Austria in 1919[291] and by Czechoslovakia in 1920,[292] members of the House of Savoy by Italy,[293] members of the

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[286] E. BORCHARD, *supra* note 282, at 710.

[287] *Study of the Right of Everyone to Be Free From Arbitrary Arrest, Detention and Exile*, at 203, para. 816 (cited in M. PELLONPÄÄ, *supra* note 74, at 20).

[288] Leibholz, *Das Verbot der Willkür und des Ermessensmissbrauches im völkerrechtlichen Verkehr der Staaten*, 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 95 (1929).

[289] H. LESSING, *supra* note 6, at 112, 116.

[290] H. LESSING, *supra* note 6, at 113 (references to state practice from first part of twentieth century); P. WEIS, *supra* note 4, at 45; *see also* J. LANGHARD, DAS RECHT DER POLITISCHEN FREMDENAUSWEISUNG MIT BESONDERER BERÜCKSICHTIGUNG DER SCHWEIZ 73 (1891).

[291] Gesetz vom 3. April 1919, StGBl. Nr. 209, betreffend die Landesverweisung und die Übernahme des Vermögens des Hauses Habsburg-Lothringen [Act of April 3, 1919, StGBl. No. 209, concerning the Expulsion and the Transfer of Property of the House of Habsburg-Lorraine] § 2. This banishment law remains in effect today, preserved by a reservation submitted by Austria during ratification of the 1966 U.N. Covenant on Civil and Political Rights (*Multilateral Treaties, supra* note 95, at 127) and the Fourth Additional Protocol to the European Convention on Human Rights (1970 BGBl.II 519).

Not until 1982 was Ex-Empress Zita allowed to enter Austria from her exile on Madeira, after it was decided that she had no rights of dynastic succession. Her son Otto von Habsburg renounced his dynastic rights, and was thus allowed to enter as well, as were his children and most of the other relatives. Der Spiegel, May 19, 1986, at 149, 151.

[292] H. LESSING, *supra* note 6, at 113 (discussion of banishment pursuant to Statute of June 9, 1920, § 17).

[293] Transitional Provision XIII of the Italian Constitution, concerning prohibition of the entry into and sojourn in the national territory of certain members of the House of Savoy. This legislation is preserved by reservation to the U.N. Covenant on Civil and

House of Holstein-Glücksburg by Greece,[294] and the Caliph and his family by Turkey in 1924.[295] The practice of banishment was, however, not restricted to dynasties.[296] France expelled a citizen with the name of Malvy,[297] and Germany banished Jewish citizens on an unprecedented scale.[298]

Expulsion of foreigners is generally viewed as an international legal privilege, if not a right, of states, subject only to one ultimate restriction, that of abuse.[299] The Institute of International Law recommended, as early as 1888, that rules should be established for the admission and expulsion of foreigners.[300] The recommended prescriptions were supposed to create a degree of certainty about a foreigner's legal status.

The Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights do not contain express provisions outrightly prohibiting the expulsion of nationals or aliens. The reluctance of several states with respect to a strict prohibition of banishment was taken into account[301] in formulating Article 12(4) of the United Nations Covenant.[302] In comparison with the denial of re-entry after voluntary departure from the home state's territory, banishment and forcible transfer

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Political Rights (*Multilateral Treaties*, *supra* note 95, at 130) and the Fourth Additional Protocol to the European Convention on Human Rights. 1982 BGBl.II 860.

[294] H. LESSING, *supra* note 6, at 113.

[295] *Id.*

[296] *See, id.*, n.2 (overview of state practice before 1937).

[297] *Harvard Law School, Research in International Law. Nationality*, 23 AM. J. INT'L L. 77 (Special Supp. 1929).

[298] P. WEIS, *supra* note 4, at 49. A more prevalent method for persecuting Jews under the Nazi regime was complete denationalization under the Statute on the Renunciation of Naturalizations and the Withdrawal of German Nationality of July 14, 1933, and the 11th Decree under the Reich Citizens Act of November 25, 1941.

[299] G. DAHM, 1 LEHRBUCH DES VÖLKERRECHTS 527 (1958). Seidl-Hohenveldern views the duty of explaining the reasons for expulsion as the only obligation of states under international law. I. SEIDL-HOHENVELDERN, VÖLKERRECHT, at Annot. 1201 (3rd ed. 1975).

[300] Projet de Déclaration internationale relative au droit d'expulsion des étrangers, September 8, 1888, Art. 1: "En principe, tout État souverain peut régler l'admission et l'expulsion des étrangers de la manière qu'il juge convenable; mais il est conforme à la foi publique que les étrangers soient avisés, au préalable, des règles générales que l'Etat entend suivre dans l'exercice de ce droit."

[301] *See supra* note 101.

[302] Art. 12(4) of the United Nations Covenant reads, "[T]he right to enter cannot be *arbitrarily* denied." (emphasis added).

of a national abroad appear to be the greater evils. For this reason international legal restrictions on the first action do not necessarily coincide with those on the latter. The fact that banishment was not addressed, is, however, significant *per se*, and may suggest the interpretation that the limitations to Article 12(4) are also applicable to this constellation of facts.[303]

The European and Inter-American human rights instruments forbid the banishment of nationals, but prohibit only the collective expulsion of aliens. Article 3(1) of the Fourth Additional Protocol to the European Convention on Human Rights mandates: "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national."

This provision is subject only to restrictions necessary "in times of war and other public emergency threatening the life of the nation."[304]

Article 4 of the Fourth Protocol states: "Collective expulsion of aliens is prohibited."

As to individual expulsions of aliens, Article 1 of the Seventh Additional Protocol to the European Human Rights Convention of November 22, 1984,[305] mandates:

> (1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision

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[303] The interpretation of the term "arbitrary" in Art. 12(4) remains controversial. *See supra* notes 98-99. The *travaux préparatoires* contain some references to banishment as a form of criminal punishment. "It was finally agreed that even though most countries had prohibited exile as a form of punishment, in those countries where it still existed it might be more humane to allow exile than to impose a more severe punishment such as lifetime deprivation of liberty." Jagerskiold, *supra* note 99, at 181. Besides that, there was no further justification for punishment: "The drafters clearly considered exile the only restriction on the right to enter one's own country. It was thought inconceivable, for example, that a state should prohibit the entry of one of its nationals for reasons of health or morality." *Id.* at 182.

[304] Art. 6(1) of the Protocol in conjunction with Art. 15 of the European Convention on Human Rights.

[305] Reprinted in: COUNCIL OF EUROPE, *Activities of the Council of Europe in the Field of Human Rights in 1984*, Doc. No. H (85) 2, at 20 (February 1, 1985). This instrument was ratified by France on February 17, 1986, and by Sweden on November 8, 1985, COUNCIL OF EUROPE, *Information Sheet No. 19 (November 1985-March 1986)*, Doc. H/INF (86) 1, at 7 (1986); by Austria on May 14, 1986, *Council of Europe, Information Sheet No. 20 (May-October 1986)*, Doc. H/INF (86) 2, at 1 (1987).

reached in accordance with law and shall be allowed:
a. to submit reasons against his expulsion,
b. to have his case reviewed, and
c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
(2) An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Virtually identical provisions are contained in Articles 22(5)[306] and (9)[307] of the Inter-American Human Rights Convention. In particular, aliens may only be expelled individually by a "decision reached in accordance with law."[308] This is in accord with Article 1 of the Seventh Protocol—a faint echo of the time-honored goal of certainty of law and status enunciated by the Institute of International Law.

Articles 12(4)[309] and 12(5)[310] of the Banjul Charter include corresponding provisions with respect to foreigners; nationals are, however, not expressly protected against banishment.[311] In the absence of clear guidance by international legal instruments, state practice, again, is crucial for elucidating the present state of the law.

A. United States of America

Justice Brewer, in the dissenting opinion of *United States v. Ju Toy*,[312] expressed grave reservations concerning the ban-

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[306] "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."

[307] "The collective expulsion of aliens is prohibited."

[308] Art. 22(6). "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law." *Id.*

[309] "A non-national legally admitted in a territory of a State Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law."

[310] "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

[311] *But see* Art. 12(2) (right to return subject to broad limitations).

"Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality." *Id.*

[312] 198 U.S. 253 (1905).

ishment of a citizen. Justice Brewer considered banishment of a citizen unthinkable, stating: "By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind."[313] This statement should be compared with the Court's unambiguous assertion of an international legal right "to exclude or to expel all aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."[314]

In a later decision, the Court brushed aside the argument that aliens might acquire an equitable right to remain after a lengthy residence in the United States, stating that

> The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose . . . .
>
> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.[315]

The formalities of deportation are regulated in the Immigration and Nationality Act.[316] The differential treatment of foreigners and citizens was justified by the United States Supreme Court as follows:

> The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Govern-

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[313] U.S. v. Ju Toy, 198 U.S. 253, 269 (1905)(Brewer, J., dissenting).

[314] Fong Yue Ting v. U.S., 149 U.S. 698, 711 (1893).

[315] Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952).

[316] 8 U.S.C. § 1251. On the history of deportation in the United States, *see* T. ALEINIKOFF & D. MARTIN, *supra* note 53, at 348 (1985). With respect to the treatment of aliens in the process of expulsion, it is crucial whether they are considered to be within United States territory. If they are deemed inside U.S. territory, their expulsion is called "deportation," and they enjoy the benefit of constitutional guarantees. Yick Wo v. Hopkins, 118 U.S. 356 (1886). These rights are denied if the alien is considered legally outside of U.S. territory, e.g. within the transit facilities of a U.S. airport or an INS detention center. He is then not "deported," but "excluded," as if he had never entered U.S. soil. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953)(justification of distinction).

ment's power to regulate its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."[317]

B. USSR

The deportation of aliens is regulated today by Article 31 of the 1981 Law on the Legal Status of Foreign Citizens in the USSR:

> A foreign citizen may be deported from the limits of the USSR if:
> (1) his actions are contrary to the interests of ensuring state security or protecting public order;
> (2) this is necessary in order to protect the health and morality of the populace and to defend the rights and legal interests of USSR citizens and other persons;
> (3) he flagrantly violated legislation on the legal status of foreign citizens in the USSR, or customs, currency or other Soviet legislation.

Regarding Soviet citizens, banishment from the USSR has been eliminated as a type of punishment by the Fundamental Principles of Criminal Legislation of the USSR and Union Republics of December 25, 1958.[318] Soviet criminal law, however, still provides for the sanctions of "exile" and "banishment."[319] "Banishment" is evidently a prohibition of remaining in a given location, whereas "exile" encompasses orders to remain within predefined geographical boundaries.[320] Unwanted emigrants are

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[317] Mathews v. Diaz, 426 U.S. 67, 80 (1976).

[318] H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 38 (2nd ed. 1972).

[319] USSR LEGISLATION, *supra* note 60 at 17.

[320] Article 24 of the Fundamental Principles of Criminal Legislation states:

> Exile shall consist of the removal of a convicted person from his place of residence with obligatory settlement in a specific locality.
>
> Banishment shall consist of the removal of a convicted person from his place of residence with a prohibition against living in specific localities.
>
> Exile and banishment both as a basic and as a supplementary punishment may be assigned for a term not exceeding five years . . .

USSR LEGISLATION, *supra* note 60, at 17.

The Criminal Code of the RSFSR has analogous provisions for exile (art. 25) and banishment (art. 26). *See* BERMAN, *supra* note 318, at 134-35 (English text).

usually prevented from returning home by denationalization prior to departure. This author is not aware of recent banishments of Soviet citizens from Soviet territory.[321]

C. Federal Republic of Germany

Article 16(2)(1) of the Basic Law prohibits the extradition of Germans to a foreign country. The concept of "extradition" is interpreted broadly and, according to one influential commentary,[322] encompasses any transfer of a German to a foreign state, irrespective of its kind or of its motive. Even if one does not share this broad interpretation of "extradition," the German law provides only for the expulsion of stateless persons and of foreign citizens who are not also Germans.[323] There are neither legal rules nor practices concerning the banishment of Germans.

In contrast, statutory grounds for the expulsion of foreigners are manifold. They are enumerated in § 10 of the 1965 Aliens Act.

Law and practice in the United States, the USSR and West Germany is thus uniform, it prohibits the banishment of nationals. Nevertheless, international human rights instruments either do not include such a prohibition, or if they do, they sanction exceptions in cases of threats to the "life of the nation." What about the practice of other states?

D. Overview of Other Legal Systems

Several states still embrace the sanction of banishment, par-

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[321] Soviet authorities tend to request renunciation of Soviet citizenship prior to granting exit visas, particularly from emigrant Jews. G. GINSBURGS, *supra* note 141; *Soviets to Let 117 With U.S. Kin Exit*, Los Angeles Times, May 26, 1986, at 1, col. 5. Much more questionable, under international law, is denationalization and expulsion against (or without) the will of a person. This happened in the case of a Soviet feminist in 1980. M. PELLONPÄÄ, *supra* note 74, at 24. Similarly problematic are the cases of human rights activists Tverdokhlebov, Chalidze and Zhores Medvedev who are reported to have been deprived of their Soviet citizenship while temporarily residing abroad, after Soviet officials obtained their passports under false pretenses. A. SAKHAROV, SAKHAROV SPEAKS 19-20 (1974)(contained in *Foreword* by H. Salisbury).

[322] T. MAUNZ, G. DÜRIG, R. HERZOG & R. SCHOLZ, GRUNDGESETZ, Art. 16, Annot. 38, 39. Commentary of T. Maunz referring to BVerfGE 10, 136, 139.

[323] *Id.* at Annot. 32.

ticularly in Latin America.[324] A most notorious example recently occurred in Chile. From General Pinochet's ascent to power in 1973 until May 1986, 200,000 citizens left the country. The Chilean exodus began with the departure of persons holding prominent positions in the Allende Government before its overthrow by the armed forces in 1973. In the mid-1970's, lower-level activists of the Communist and Socialist parties departed. Many were released from prison on the condition that they accept banishment to a foreign country for the remaining years of their sentence. Others fled out of fear after being interrogated by security agents. Of these exiles, 3,719 were specifically prohibited from returning. Their names were published on the exclusion lists of the Ministry of Interior.[325] On December 31, 1986, President Pinochet announced that most Chilean exiles would be allowed to return, excepting only those who "constitute a serious threat to

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[324] For an overview see T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS 85-87 (1982). Examples of these practices in the mid-70's are documented in *Latin America—Expulsion, the Rights to Return, Passports*, 14 INT'L COMM'N JURISTS REV. 3 (June 1975)[hereinafter JURISTS' REVIEW]. Former (and later) Presidents of Bolivia, Victor Paz Estenssoro and Hernan Siles Suazo, were exiled by General Hugo Banzer's military government in 1974 and 1975, respectively. *Id.* at 4. At the same time, Peru's military authorities expelled citizen members of the political opposition. *Id.* at 6-7. Similar measures were taken by the civil-military government in Uruguay. *Id.* at 7-8.

[325] *Most Chile Exiles Still Keeping Their Distance*, N.Y. Times, May 4, 1986, at A6, col. 1. The practice of leaving prisoners the choice between exile and continued incarceration goes back to a speech by General Pinochet on September 11, 1974. In it, he suggested that all political prisoners, with the sole exception of those sentenced for the most serious crimes, should be "released" on condition that they leave the national territory. JURISTS' REVIEW *supra* note 324, at 5. The practice of expulsion continued in the mid-1980's, although on a smaller scale. In August 1981, Jaime Castillo Velasco, president of the Chilean Commission on Human Rights, was expelled from Chile for signing a petition protesting the imprisonment of two trade union leaders. Eight more human rights activists were ordered into exile by a Chilean court on August 11, 1982. *U.S. Lawyer to Assess Appeal of 8 Rights Activists in Chile*, N.Y. Times, Aug. 30, 1982, at A4, col. 1. In July 1984, the Chilean Government expelled four leftist opposition members as "spies of the Soviet Union." Neue Zürcher Zeitung, Fernausgabe No. 172, July 27, 1984, at 4. As to further cases see BUERGENTHAL, NORRIS & SHELTON, *supra* note 324, at 86. The Chilean practice has been condemned by international fora several times. *See* Resolution 1982/25 of the U.N. Human Rights Commission, para. 4 (g), ECOSOC Off. Rec. 1982, Supp. 2, at 140, 142. The Chilean Government's view is stated in U.N. Doc. CCPR/C/SR. 130 (1979), at 10-11. *See* M. PELLONPÄÄ, *supra* note 74, at 21. This expulsion abroad accompanies the even more common practice of "internal exile." *Chile, Moving to Block Protests, Banishes 140 Into Internal Exile*, N.Y. Times, Oct. 30, 1984, at A1, col. 4.

national security."[326]

The instrument of banishment has also been used recently by other authoritarian regimes in the hemisphere. In June 1986, Paraguay thwarted the attempt to return by a banished opposition leader.[327] On the other side of the political spectrum, Nicaragua banished the Catholic bishop Pablo Vega, on July 4, 1986, due to his alleged support of the *contra* rebels.[328]

The resurrection of banishment is not limited to Latin America. There are indications that the Vietnamese "boat people," at least in some instances, did not voluntarily leave their country,[329] and in post-Solidarity Poland the idea of banishing nationals convicted of "serious crimes against the state" was circulated in a draft by the Ministry of Justice.[330]

E. Conclusion

State practice and *opinio juris* seemingly have not yet matured to the point of strictly prohibiting the banishment of nationals—at least not in those cases where other states are willing

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[326] *Pinochet Says Exiles May Return*, Washington Post, Jan. 1, 1987, at A26, col. 4.

[327] Domingo Laino made his fifth attempt to return to Paraguay in contravention of President Stroessner's banishment order. Although he was accompanied by a former U.S. ambassador, he "was subjected to a brutal beating" by the Paraguayan security forces and was forced to leave the country again in the same airplane in which he had arrived. *Paraguayan Police Beat Exile*, N.Y. Times, June 25, 1986, at A3, col. 2. In April 1987, Domingo Laino was finally allowed to return from exile. *In Leader's Autumn, Murmurs Grow*, N.Y. Times, Dec. 22, 1987, at 6, col. 1.

[328] The official reasoning of the Government read as follows:

> Given the reiterated antipatriotic and criminal attitude of Bishop Vega, it has been decided to indefinitely suspend the right to remain in the country to those who, like Bishop Vega, do not deserve to be Nicaraguans and whose place is at the side of Reagan and the mercenary bands.

Nicaragua Announces Expulsion of a Bishop, N.Y. Times, July 5, 1986, at A2, col. 6.

In the meantime, Government officials say he is welcome back to Nicaragua, "so long as [he] obey[s] the law." *Nicaragua to Allow Reopening of Station*, Miami Herald, Feb. 12, 1987, at 24A, col. 2-3.

The expulsion of Church officials has a precursor in 1937 Mexico. H. LESSING, *supra* note 6, at 113, reports the intended, and partially realized, banishment of all Catholic archbishops, bishops and priests from Mexico.

[329] Khan, *Study on Human Rights and Massive Exoduses*, U.N. ESCOR. Annex 2 (Agenda Item 12(b) at 33-34) U.N. Doc. E/CN.4/1503 (1981).

[330] The Polish Minister of Justice underscored the "humane" character of this form of punishment as compared to the deprivation of liberty. Frankfurter Allgemeine Zeitung, Sep. 22, 1984, at 4.

to admit the persons concerned. Thus, although banishment of citizens is prohibited in principle, it may be allowed in times of national emergency if circumstances so demand. Regardless, nationals are afforded a significant measure of security from banishment, whereas aliens are not.

This difference may be translated into the third transnational function of nationality:

Nationals may not be banished from their home state's territory unless there is a public emergency that threatens the life of the nation. Even then, this measure must be strictly required by the exigencies of the situation.

VI. EXTRADITION

Extradition is defined, for the purposes of this inquiry, as the forcible removal of a person from the jurisdiction of one state for transfer to the jurisdiction of a foreign state upon the request of the foreign state.[331] It is primarily, though not exclusively,[332] an act of international judicial assistance in criminal matters.

The practice of extradition dates back to the dawn of humankind—to the early cultures of Egypt, China, Chaldaea, Assyria and Babylonia.[333] The oldest known extradition agreement was concluded in 1280 B.C., in the framework of a peace treaty between Pharaoh Ramses II of Egypt and the Hittite King Hattusili.[334] The Greek city-states and Rome entered into such

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[331] Schnapp, in GRUNDGESETZ-KOMMENTAR, Art. 16 Annot. 17 (I. v. Münch 3rd ed. 1985).

[332] As advocates of a narrow, criminal law-oriented interpretation contend; *see* M. BASSIOUNI, INTERNATIONAL EXTRADITION. UNITED STATES LAW AND PRACTICE § 1-1 (1983)(system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or a fugitive offender); T. VOGLER, AUSLIEFERUNGSRECHT UND GRUNDGESETZ 60 (1970); v. Mangoldt, *Auslieferung*, in EVANGELISCHES STAATSLEXIKON 98 (2nd ed. 1975).

[333] Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39, 41-42 (1981).

[334] Langdon & Gardiner, *The Treaty of Alliance Between Hattusili King of the Hittites and the Pharaoh Ramesses II of Egypt*, 6 J. EGYPTIAN ARCHAEOLOGY 179 (1920); Mettgenberg, *Vor mehr als 3000 Jahren*, 25 ZEITSCHRIFT FÜR VÖLKERRECHT 23 (1939); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971).

agreements as well.[335] From antiquity until the late eighteenth century, the prime motivation for requests for extradition was political.[336] Bassiouni discerns four phases of extradition history. In the first one, from antiquity to the seventeenth century, agreements in this area concerned, almost exclusively, political and religious "offenders." In the second period, from the eighteenth up to the first half of the nineteenth century, the main concern was with deserters. From 1833 till 1948, the focus was on common criminals. Since 1948, as conveyed by the Universal Declaration of Human Rights, the protection of substantive and procedural rights of the person sought after has occupied center stage.[337]

Beyond treaties, Grotius formulated the following general rule of international law: The state of refuge has the "natural" right and obligation to either deliver up the charged person to the requesting state or to punish him or her under its own laws.[338] Vattel agreed with Grotius.[339] However, Pufendorf, the founder of the positivist school, insisted that the general duty to extradite was only an "imperfect" obligation: to be binding upon a particular state in a particular case, there would have to be an express agreement between the states concerned.[340] This latter opinion prevails today,[341] although the theory of an international legal duty to extradite was dominant, for example, in German legal doctrine up to the end of the nineteenth century.[342]

Overwhelmingly, states today grant extradition only by

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[335] C. PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 358-74 (1979).

[336] After all, common crimes were usually only hurting other individuals, not the ruler or the ruling elites. M. BASSIOUNI, *supra* note 332, §§ 1-4.

[337] *Id.* at §§ 1-5.

[338] H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, 526-29 (F. Kelsey trans. 1929). This view gave rise to the maxim *aut dedere aut punire*. M. BASSIOUNI, *supra* note 332, at § 32-1. Bassiouni criticizes that this formula implies that the person charged is guilty and therefore *aut dedere aut judicare* would appear to be the better formulation. *Id.*

[339] E. VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 136-37 (C. Fenwick trans. 1916) (1758).

[340] S. PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 165 (W. Oldfather trans. 1931) (1672).

[341] I. SHEARER, *supra* note 334, at 24; Blakesley, *supra* note 333, at 53.

[342] H. LAMMASCH, AUSLIEFERUNGSPFLICHT UND ASYLRECHT 40 (1887).

treaty.[343] The United States, the United Kingdom and most countries of the common law tradition require, prior to the contractual[344] act of extradition in any given case, the existence of a pertinent treaty between the states concerned. Such treaties contain a list of extraditable offenses and state the limits to extradition.[345] In some states, however, primarily those of the civil law tradition, principles of comity and reciprocity, supplemented by national legislation, are still sufficient legal bases for granting such a request.[346] This is true, in particular, for France, the Federal Republic of Germany, and several states in Latin America.[347] According to Bassiouni, consistent state practice on the basis of comity alone may never give rise to legally binding obligations for the future, the acts of extradition being only "acts of courtesy;" this may be different if state practice is based upon the principle of reciprocity.[348] The procedures of extradition outside of treaties are regulated in domestic extradition statutes.

Accordingly, customary international law does not include a duty to extradite.[349] Nor has the world community yet succeeded in formulating a consensus on values to be protected that would form the basis for a customary legal rule of *aut dedere aut judicare*.[350]

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[343] Kimminich states that under present international law a duty to extradite may only be established by treaty. Kimminich, BONNER KOMMENTAR, *Drittbearbeitung* Art. 16 Annot. 72 (1984).

[344] *See* VOGLER, *supra* note 332, at 32 (extradition a composite event consisting of request and grant of extradition).

[345] *See* Kimminich, *supra* note 343, Annot. 75, and his useful distinction between a "general" and a "specific" extradition agreement.

[346] M. BASSIOUNI, *supra* note 332, § 2-2.

[347] *Id.* § 2-3. In the Federal Republic of Germany, approximately five percent of all extraditions are handled without preexisting general treaty, according to the provisions of the domestic Statute on International Judicial Assistance in Criminal Matters. Kimminich, *supra* note 343, Annot. 84.

[348] M. BASSIOUNI, *supra* note 332, § 2-4. That distinction would seem to be rather formalistic. To avoid reliance by other states on those routinely granted "acts of courtesy," and thus to avoid being barred from changing this practice in the future under theories of good faith and estoppel by conduct, states would have to attach to each such act rather strong disclaimers of legal obligation.

[349] I. SHEARER, *supra* note 334, at 27; Kimminich, *supra* note 343 Annot. 72.

[350] A state's obligation either to extradite or to prosecute an offender has been established in a few treaties. *E.g.*, United Nations Convention Against Torture and Other

Extradition is of interest for the purposes of this analysis due to the widespread practice of non-extradition of nationals.[351] Whether grounded in the political philosophies of the absolute monarchies,[352] or in the ideas of Enlightenment and Romanticism,[353] scholarly doctrine agrees that the modern origin of this practice can be found in seventeenth-century Continental Europe.[354] It was frequently manifested in constitutionally-mandated prohibitions of the extradition of citizens.[355] Nevertheless, in 1880, the Institution of International Law, inspired by the idea of a *civitas maxima*, membership in a world community, suggested that even nationals be delivered to foreign states with a similar legal culture:

> Entre pays dont les législations criminelles reposeraient sur des bases analogues, et qui auraient une mutuelle confiance dans leurs institutions judiciaires, l'extradition des nationaux serait un moyen d'assurer la bonne administration de la justice pénale, parce qu'on doit considérer comme désirable que la juridiction du forum delicti commissi soit, autant que possible, appelée à juger.[356]

Beyond the network of bilateral extradition treaties which contain, in part, clauses on non-extradition of citizens, there are

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Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984, U.N. Doc. A/RES/39/46, Art. 7(1); OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, of February 2, 1971, 27 U.S.T. 3949, Art. 5; European Convention on Extradition of December 13, 1957, European Treaty Series No. 24, 359 U.N.T.S. 273, Art. 6.

[351] R. RAFUSE, THE EXTRADITION OF NATIONALS 51-55 (1939); Baltatzis, *La non-extradition des nationaux*, 13 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 190 (1960); I. SHEARER, *supra* note 334, at 94.

[352] Kimminich, *supra* note 343, Annot. 77.

[353] D. OEHLER, INTERNATIONALES STRAFRECHT 11-12 (2d ed. 1983).

[354] *Id.* The roots of this principle, however, date back to antiquity; neither the Greek city-states nor Rome extradited their own citizens. I SHEARER, *supra* note 334, at 95; Baltatzis, *supra* note 351, at 197.

[355] Kimminich, *supra* note 343, Annot. 77. In Germany, the prohibition was first written into the German Penal Code of 1871 (§ 6), and later into the Weimar Constitution of 1919 (Art. 112(3)).

[356] Resolution of September 9, 1880, No. 6, reprinted in INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉSOLUTIONS 1873-1956 380 (1956). *See also* Harvard School of Law, *Draft on Extradition*, 29 AM. J. INT'L L. 128 (1935).

very few multilateral agreements touching on the issue. The European Convention on Extradition of December 13, 1957,[357] codifies the principle of *aut dedere aut judicare*. According to Article 6(1)(a), "[a] contracting party shall have the right to refuse extradition of its nationals."[358] However, Article 6(2) adds, "If the requested Party does not extradite its national, it shall at the request of the requesting party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate."[359]

The 1928 Inter-American Código Bustamante on Private International Law submits the extradition of nationals to the discretion of member states. If a member state refuses to extradite its nationals, it is obligated to commence criminal prosecution proceedings itself.[360] The same is true under Art. 2 of the 1933 Montevideo Convention on Extradition.[361] On this basis, a noted scholar reaches the conclusion that general international law leaves delivery of nationals to the discretion of the state.[362]

A. United States of America

The 1982 Extradition Act[363] allows the extradition of U.S. citizens provided that such extradition is not prohibited by a particular extradition agreement.[364]

United States extradition treaties may be classified into three categories. The first group of treaties provides generally for the extradition of all persons without specifically addressing the situation of nationals.[365] The U.S. Supreme Court inter-

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[357] 359 U.N.T.S. 273.

[358] *Id.* at 280.

[359] *Id.*

[360] BUSTAMANTE CODE OF PRIVATE INTERNATIONAL LAW (1928), 86 L.N.T.S. 120, 4 M. Hudson, *Int'l Legislation* 2283 (1931); *see* I. SHEARER, *supra* note 334, at 116 (review of treaty status in Latin America); M. BASSIOUNI, *supra* note 332, § 3-10 (extradition of national optional).

[361] 165 L.N.T.S. 45, 28 AM. J. INT'L L. 65 (Supp. 1934). The treaty also contains the following optional clause: "In no case will the nationality of the criminal be permitted to impede his extradition." *Id.*

[362] M. BASSIOUNI, *supra* note 332, § 2-3.

[363] 18 U.S.C. § 3181 (1982).

[364] M. BASSIOUNI, *supra* note 332, § 3-10.

[365] Treaty of Amity, Commerce and Navigation (Jay Treaty), November 19, 1794,

preted these agreements to the effect that they prohibited the denial of extradition of nationals.[366]

The second category of treaties contains provisions such as "Neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention."[367]

United States-United Kingdom, Art. XXVII, 8 Stat. 116, T.S. No. 105, 1 Bevans 13. One of the first extradition treaties of modern times, it stated:

> It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice *all persons*, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive. [Emphasis added].

Id. at 129.

One of the most recent U.S. extradition treaties follows that model. *See* the agreement with Italy of October 13, 1983, 24 INT'L LEGAL MAT. 1525 (1985). It, however, adds the express provision, in Art. IV: "A Requested Party shall not decline to extradite a person because such person is a national of the Requested Party." *Id.* at 1528.

[366] Charlton v. Kelly, 229 U.S. 447 (1913). The Court stated:

> [T]he word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The United States-Italian treaty contains no reservation of citizens of the country of asylum. . . . [T]here is no principle of international law by which citizens are excepted out of an agreement to surrender "persons" where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes all persons when not qualified as it is in some of the treaties between this and other nations.

Id. at 465-67.

It certainly is, at least, "debatable" whether, "etymologically," the word "persons" includes "citizens": the linguistic roots are hardly the same. In substance, the Court's interpretation is compelling. The same position has been taken, *inter alia*, by Canadian courts. *See* M. BASSIOUNI, *supra* note 332, at § 3-3.

[367] Extradition Treaty, June 7, 1934, United States-Iraq, Art. VIII, 49 Stat. 3380, 3383, T.S. No. 907, 9 Bevans 1; Extradition Treaty, January 21, 1922, United States-Venzuela, 43 Stat. 1698, 1703, T.S. No. 675, 12 Bevans 1128. Similar clauses are to be found in the treaties with Mexico of 1861, 1 Malloy 1125, with Japan of April 29, 1886, 24 Stat. 1015, with Argentina of September 26, 1896, 3 Stat. 1883, with the Orange Free State of 1896, with Guatemala of February 27, 1903, 33 Stat. 2147, with Nicaragua of March 1, 1905, 35 Stat. 1869, and with Uruguay of March 19, 1905, 35 Stat. 2028, all cited in I. SHEARER, *supra* note 334, at 113. More modern agreements include the treaties with Liberia of November 1, 1937, 54 Stat. 1733, and with Monaco of February 15, 1939, 54 Stat. 1780, I. SHEARER, *supra* note 334, at 114.

In the context of such a treaty with France,[368] the U.S. Supreme Court has interpreted this provision to the effect that it does not confer to the President the authority necessary to extradite U.S. citizens.[369]

In order to counter this interpretation, and to achieve its goal of discretion, the Executive Branch moved towards a third type of treaty that contained clauses such as "Neither of the Contracting Parties shall be bound to deliver up to its own citizens under the stipulations of this Convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper to do so."[370]

Early United States treaty policy aimed at excepting citizens from extradition whenever possible.[371] This is no longer true today.[372] In 1978, the United States even entered into agreements with Mexico[373] and the Federal Republic of Germany[374] that allowed the extradition of United States citizens to these countries which are barred from delivering up their own nationals by their Constitution or longstanding practice.[375] Although this violation of the general principle of reciprocity has been criticized,[376] United States courts have enforced these

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[368] Extradition Treaty, January 6, 1909, United States-France, 37 Stat. 1526, T.S. No. 561, 7 Bevans 872.

[369] Valentine v. United States, 299 U.S. 5 (1936); *see* Garner, *Non-Extradition of American Citizens — The Neidecker Case*, 30 AM. J. INT'L L. 430, 482-86 (1936)(opposite interpretation of clause by courts in Mexico, England, Switzerland); R. RAFUSE, *supra* note 351, at 51 (same).

[370] *See* Supplemental Extradition Agreement, February 12, 1970, United States-France, Art. III, 22 U.S.T. 407, 409-10, T.I.A.S. No. 7075; Extradition Agreement, January 21, 1971, United States-Argentina, Art. V, 23 U.S.T. 3501, 3508, T.I.A.S. No. 7510; Extradition Agreement, March 3, 1978, United States-Japan, Art. V, 31 U.S.T. 892, 895-96, T.I.A.S. No. 9625.

[371] *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 55-65 (1942).

[372] M. BASSIOUNI, *supra* note 332, § 3-2.

[373] Extradition Treaty, May 14, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[374] Extradition Treaty, June 20, 1978, United States-F.R.G., with Protocol, 32 U.S.T. 1485, T.I.A.S. No. 9785.

[375] M. BASSIOUNI, supra note 332, at § 3-10.

[376] *Id.* at § 2-4. The author notes, however, that the principle of reciprocity had already been violated under the 1838 treaty between Mexico and the United States: "In fact, Mexico has never extradited any of its citizens to the United States while the United States has extradited a number of its citizens to Mexico." *Id.*

treaties.[377]

B. USSR

The USSR grants extradition requests on the basis of general treaties or in individual cases upon diplomatic request. To this purpose, it has concluded agreements on judicial assistance with Eastern European states, and an extradition convention with the German Democratic Republic in 1978. The latter provides for the serving of sentences in the home state.[378]

With respect to the treatment of nationals, Article 7 of the USSR Citizenship Act of December 1, 1978, states clearly: "A citizen of the USSR may not be extradited to a foreign state."[379]

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[377] In 1984, the United States Court of Appeals for the Seventh Circuit permitted the extradition of a U.S. citizen to West Germany where he was to stand trial for a murder committed in 1965. The court held that no due process right existed which made it fundamentally unfair for the United States to decide not to return a serviceman pursuant to the status of forces agreement and then subsequently to decide to extradite him pursuant to a separate extradition request after considerable time had transpired. *In re* Burt, 737 F.2d 1477, 1486 (7th Cir. 1984). In a parallel case extradition was denied, relying on an army colonel's fifteen-year old promise of freedom from extradition to the serviceman. Plaster v. United States, 789 F.2d 289 (4th Cir. 1986).

For a recent example of extradition of a U.S. citizen to Mexico see Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980), referring to Charlton v. Kelly, 229 U.S. 446 (1913) and Peroff v. Hylton, 563 F.2d 1099 (4th Cir. 1977).

[378] D. Budde, Die Rechtsstellung des Ausländers in der Sowjetunion 290 (1981). *See also*, for purposes of internal implementation, the USSR Edict on the Procedure for the Fulfillment of Obligations Arising for the USSR From the Convention on the Transfer of Persons Sentenced to Deprivation of Freedom to Serve the Punishment in the State of Which They Are Citizens of August 10, 1979, Ved. Verkh. Sov. SSSR 1979, no. 33, item 540; English translation in: USSR Legislation, *supra* note 60, no. VII-10.

The transfer of nationals to their home country for the purposes of serving jail time there is a more recent practice that seems to flourish in comparatively homogeneous regional systems: within the Eastern bloc on the basis of a network of bilateral treaties or within Western Europe on the basis of the Council of Europe Convention of March 21, 1983 on the Transfer of Sentenced Persons, *see* Kimminich, *supra* note 343, Annot. 79. For this reason, it cannot be considered a universal, transnational feature of nationality. The conduct of the criminal proceedings in the state of the *locus delicti commissi* and subsequent serving of the sentence in the home state of the offender is, however, a good alternative to the present practice of either denying or allowing extradition. *See* I. Shearer, *supra* note 334, at 125.

[379] Ved. Verkh. Sov. SSSR 1978, no. 49, item 816; English translation in USSR Legislation, *supra* note 60, no. I-6, at 3. *See also* V. Shevtsov, *supra* note 131, at 23; Pusylewitsch, *supra* note 60, Art. 33 Annot. 30 (stating close relationship of this provision with principle of protection of Soviet citizens abroad as first enunciated in 1977 Constitution of the USSR).

Practice apparently conforms with this prescription.[380]

C. *Federal Republic of Germany*

Extraditions by the Federal Republic of Germany are now governed by the Statute on International Judicial Assistance in Criminal Matters of December 23, 1982,[381] and applicable treaties. The Constitution, however, already exempts Germans from being extradited. Article 16(2)(1) of the Basic Law mandates that "no German may be extradited to a foreign country."

This provision also protects multiple nationals who possess other nationalities besides the status as a German under Article 116 of the Basic Law.[382] It constitutes a subjective public right that can be enforced against the government.[383] The concept of "extradition" is interpreted broadly. The Federal Constitutional Court has held that the government is barred by this provision from any participation in a forcible removal of a German from German territorial jurisdiction and his/her transfer into a non-German territorial jurisdiction.[384]

D. *Overview of Other States' Practice*

The practice of states concerning the extradition of nationals may be summarized as follows: States with a civil law legal tradition generally tend to exempt nationals; common law states

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[380] G. GINSBURGS, *supra* note 134, at 66. In 1926, Soviet doctrine still had propounded the opposite thesis, namely that "Soviet law, to which is alien the narrowly nationalistic outlook, does not prohibit the extradition of our own citizens, siding in this respect with the Anglo-Saxon system." This policy was reversed under Stalin, with lasting effect. *Id.*

[381] Gesetz über die Internationale Rechtshilfe in Strafsachen, 1982 BGBl.I 2071. This statute, in force since July 1, 1983, replaces the German Extradition Act of December 23, 1929, Deutsches Auslieferungsgesetz, 1929 RGBl.I 239.

[382] Schnapp, *supra* note 331, at Annot. 19 with further refernces.

[383] *Id.* at Annot. 20; Kimminich, *supra* note 343, Annot. 108.

[384] BVerfGE 10, 136, 139, similar to a line of decisions by the Federal Supreme Court, BGHSt 5, 404; 12, 264; *see* MAUNZ, *supra* note 322, Annot. 42. There exists, however, much controversy over the issue whether a German may be "re-transferred" to a foreign country. BVerfGE 10, 139; MAUNZ, *supra* note 322, Annot. 42; Schnapp considers this a violation of Art. 16(2)(1) of the Basic Law. A later decision of the Federal Constitutional Court, BVerfGE 29, 183, and the Federal Supreme Court, BGHSt 5, 396, reach the opposite result.

do not.[385] The United Kingdom, Canada, Australia, New Zealand and many other present or former members of the British Commonwealth provide for possible extradition of their nationals.[386] According to Kimminich and Oehler, this is also true for the civil law states of Argentina (with respect to "novel citizens"), Chile, Uruguay, Paraguay, Mexico, Italy, Sweden and Japan.[387] While another scholar would disagree with respect to Mexico,[388] Shearer has stated with respect to Argentina, Uruguay and other Latin American countries that "[t]he laws of Argentina, Colombia, Guatemala, Panama, Peru, Salvador, Uruguay and Venezuela forbid the rendition of a citizen, whether by birth or by naturalization before the commission of the crime, for trial abroad."[389]

With respect to Colombia, the situation has changed. Traditionally opposed to the extradition of its own nationals,[390] in 1979 it entered into a treaty with the United States that allows the extradition of its own nationals.[391] The driving force behind

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[385] Bassiouni's statement "As a general rule, European states exempt nationals while common law states do not" fails to take into account that most of the countries in Latin America also practice this exception. M. BASSIOUNI, *supra* note 332, at § 3-1.

[386] Kimminich, *supra* note 343, Annot. 103; M. BASSIOUNI, *supra* note 332, § 3-4. Shearer lists virtually the entire British Commonwealth, with the exceptions of Cyprus and Ireland:

> Member countries of the Commonwealth, and former members, have either continued in force the Imperial Extradition Act 1870 or have substantially reenacted it. Moreover, these States have, in general, acknowledged their succession to British treaties. Thus it can be affirmed that the laws of Australia, Burma, Canada, Ceylon, Gambia, Ghana, India, Israel, Jamaica, Kenya, Malawi, Malaysia, Malta, New Zealand, Nigeria, Pakistan, Rhodesia, Sierra Leone, South Africa, Tanzania, Trinidad and Tobago, Uganda and Zambia, together with those of Great Britain, do not reject in principle the extradition of their own citizens to foreign countries.

I. SHEARER, *supra* note 334, at 102.

[387] Kimminich, *supra* note 343, Annot. 103; D. OEHLER, *supra* note 353, at 176-77.

[388] M. BASSIOUNI, *supra* note 332, § 2-4. Shearer points out, that, in Mexico, the extradition of nationals is at the discretion of the Executive branch, just as in Ecuador. I. SHEARER, *supra* note 334, at 115.

[389] I. SHEARER, *supra* note 334, at 115.

[390] *See In re* Arevalo, ANN. DIG. PUB. INT'L L. CASES 329, 330 [Case No. 99] (1942)(statement of Colombian Supreme Court regarding reason for prohibiting extradition).

[391] Extradition Treaty of September 14, 1979 (in force since March 4, 1982), United States-Colombia, U.S. Dept of State, Treaties in Force, Status as of January 1, 1986, at 36 (1986).

this marked change of policy was the desire to bring powerful Colombian actors in the international trade of illegal drugs[392] to effective justice in the United States. Under this treaty, sixteen suspected Colombian narcotics traffickers, among them notorious drug "king-pin" Carlos Lehder, have been extradited to the United States. Another sixty drug-related extradition requests by the United States were pending when the Supreme Court of Colombia, on June 25, 1987, declared unconstitutional the domestic law accepting and implementing the U.S.-Colombian extradition treaty of 1979.[393] This controversial decision hinged upon a technicality; it was not based on the ground that Colombian law forbade the extradition of Colombian nationals. The U.S. Embassy in Colombia takes the correct position that, under international law, Colombia is still bound to comply with its obligations under the treaty.[394]

Whatever the fate of this particular agreement, many countries of Latin America, including Brazil, still honor the tradition of non-extradition of nationals as do their Western European counterparts of France,[395] the Federal Republic of Germany, Switzerland, Belgium, Luxembourg and the Netherlands.[396] In Eastern Europe, the USSR, Bulgaria, Czechoslovakia, the German Democratic Republic, Yugoslavia, Rumania and Poland all follow the non-extradition tradition.[397]

One may, thus, conclude that at least the members of one major legal family, the states of the common law tradition, do *not* exempt nationals from extradition. The context of extradition, therefore, cannot be considered a common, transnational feature of nationality.

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[392] Law enforcement officers contend that a group of billionaire Colombians controls about 75 percent of the international cocaine trade. *Extradition law voided in Bogota*, Miami Herald, June 28, 1987, at 1A, col. 3.

[393] *Id.* at 15A, col. 1.

[394] *Id.*

[395] Earlier French practice was based on a circular of the Minister of Justice of April 5, 1841. Today's legal basis is Art. 3(1) of the Extradition Law of 1927. I. SHEARER, *supra* note 334, at 104.

[396] *Id.* at 106.

[397] *See* Lipowscheck, *Auslieferung und Rechtshilfe in Strafsachen in Ost- und Südosteuropa*, 9 WGO 22, 32-33 (1967); Baltatzis, *supra* note 351, at 201.

VII. Conclusion

Only within the territory of their home state can nationals enjoy all the benefits, and bear all the burdens, of citizenship. States' interests and the desires of individuals have converged to establish a special link, a nexus with the force of law between a national and his home territory. Current state practice across the board of legal systems and traditions affirms the following substantive rules:

> (1) A state is under a duty to admit its nationals if no other state is willing to accept them.
> (2) A national has a right to enter into and return to his or her home state.
> (3) Nationals may not be banished from the territory of their home state.
> (4) In times of public emergency which threaten the life of the nation states may take measures derogating from their obligations under (2) or (3), but only to the extent strictly required by the exigencies of the situation.

Accepted as law, such prescriptions reflect the expectations of modern-day ruling elites regarding what is right or wrong concerning the treatment of nationals in the highly active context of movement of people across borders. They constitute the present link, under customary international law, between nationality and territory. These rules are necessary features of a substantive transnational concept of citizenship — an idea that emerges from, and transcends, the wide variety of legal consequences bound together in the status of membership in discrete territorial communities. They are essential parts of the script for the role of a national in global society at the turn of the twenty-first century.

THE MISSISSIPPI ELECTION CODE OF 1986: AN OVERVIEW

R. Andrew Taggart and John C. Henegan***

Election laws and election day practices in Mississippi have not gone unnoticed. From the advent of Jim Crow laws in the late nineteenth century, through the struggles of the modern civil rights era, and on into the present decade, the eyes of the nation and the hopes of innumerable voters and candidates have been fixed upon the laws and activities affecting Mississippi's public elections.

With the enactment of the Voting Rights Act of 1965[1] and its amendments in 1982[2] (Voting Rights Act), Mississippi election law underwent a metamorphosis. Partly as a result of the Voting Rights Act and partly in compliance with federal court orders, the state's system of election laws has been inexorably

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[1] Voting Rights Act,Pub. L. 89-110, 79 Stat. 445 (Aug. 6, 1965) (codified at 42 U.S.C. §§ 1971-1974 (1965)).

[2] 42 U.S.C. § 1973 (Supp. 1987). The amendments of 1982 were held constitutional in Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss. 1984)(interim redistricting plan implemented to secure black citizen's voting rights), *aff'd sub nom.*, Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984).

For a discussion of the rules of construction applicable to the amendments of 1982, *see* Comment, *The Results Test of Amended Section 2 of The Voting Rights Act: An Examination of the Senate Report Factors*, 54 Miss. L.J. 289 (1984)(replacement of "intent" standard with "results" standard). *See also* Comment, *Mississippi and The Voting Rights Act: 1965-1982*, 52 Miss. L.J. 803, 826-31 (1982)(significant changes which followed adoption of amendments).

transformed in areas such as residency requirements for voting[3] and registration,[4] voter assistance,[5] and access to absentee ballots.[6]

Despite the vast substantive changes in Mississippi's election system wrought by the federal government and the United States Constitution, Mississippi law had undergone until 1986 no corresponding change in codification. Indeed, rather than amending the Code or the state constitution after a mandate from the federal courts, the state legislature historically did nothing,[7] or it simply tacked an additional section onto the existing statutory scheme without making any attempt to retain the integrity of the Code.[8]

The Mississippi Election Code of 1986 (Election Code)[9] represents a cautious effort to remedy the deficiencies resulting from the state's earlier practices. First, the Election Code brings

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[3] *See* Graham v. Waller, 343 F. Supp. 1, 3 (S.D. Miss. 1972)(provisions of Mississippi Constitution and statute requiring that qualified elector have residence of one year in state and county and six months in precinct or municipality violate equal protection clause of fourteenth amendment); *see also* Dunn v. Blumstein, 405 U.S. 330, 333 (1972)(equal protection clause violated due to obtrusive residence requirements); Green v. McKeon, 468 F.2d 883, 884-85 (6th Cir. 1972)(states demanding excessive residence requirements for elector qualification violate equal protection clause of fourteenth amendment).

[4] *See* Ferguson v. Williams, 343 F. Supp. 654, 656 (N.D. Miss. 1972)(Mississippi's four month registration requirement for voting in state and local elections violates equal protection clause of fourteenth amendment); *see also* Jackson v. Bowen, 420 F. Supp. 316, 317 (S.D. Ind. 1976)(equal protection clause violation due to registration requirement); Nichols v. Schaffer, 344 F. Supp. 238, 242 (D. Conn. 1972)(registration requirements for voting in state and local elections violate equal protection clause of fourteenth amendment).

[5] *See* 42 U.S.C. § 1973aa-6 (Supp. 1987)(voter declaring himself blind, disabled or illiterate may receive assistance from qualified individual).

[6] *See* Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984)(pretrial detainees have right to vote by absentee ballot or Mississippi Absentee Voter Law violates equal protection clause of fourteenth amendment); *see also* O'Brien v. Skinner, 414 U.S. 524, 530-31 (1974)(absentee ballots allowed for pretrial detainees in order to comply with equal protection clause); Dawson v. Kendrick, 527 F. Supp. 1252, 1316 (S.D.W. Va. 1981)(pretrial detainees have right to vote by absentee ballot).

[7] *See, e.g.* Miss. Const. art. 12, § 241 (1890)(qualifications of electors in direct contravention of Graham v. Waller, 343 F. Supp. 1 (S.D. Miss. 1972)).

[8] *See* The Sun/The Daily Herald, Jan. 28, 1985, at A12 "Election Review May Require Two Sessions" (discussion of time required by Mississippi legislators to review Task Force recommendations).

[9] MISS. CODE ANN. §§ 23-15-1 to -1111 (Supp. 1987).

the state's substantive law into compliance with minimum federal standards.[10] Because the substance of the newly codified provisions was already effective by virtue of the United States Constitution's supremacy clause,[11] however, the task of the legislature in bringing Mississippi's election law up to date might be viewed as secondary. The prime motivation in enacting the Election Code was a broad desire to consolidate the entire body of Mississippi's election law.[12]

I. Legislative History

A. The Election Law Reform Task Force of 1984

In the spring of 1984, Honorable Dick Molpus, Secretary of State of the State of Mississippi,[13] appointed a 25-member Election Law Reform Task Force (Task Force) to rewrite Missis-

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[10] *Compare* Miss. Code Ann. § 23-15-11 (Supp. 1987)(qualifications of electors) *with* Murphree v. Winter, 589 F. Supp. 374, 380 (S.D. Miss. 1984)(qualifications for absentee voters); Ferguson v. Williams, 343 F. Supp. 654, 656 (N.D. Miss. 1972)(residential requirement for voter registration); Graham v. Waller, 343 F. Supp. 1, 3 (S.D. Miss. 1972)(elector residence requirements). *See also* Miss. Code Ann. § 23-15-549 (Supp. 1987)(assistance to voters); 42 U.S.C. § 1973aa-b (Supp. 1987)(assistance allowed for blind, disabled or illiterate voter).

[11] U.S. Const. art VI, cl. 2 (1789).

[12] The Clarion Ledger, June 20, 1984, at 3B (State of Mississippi Secretary of State, Dick Molpus, appoints Task Force to streamline election system). Notably, this latter goal has been almost literally accomplished. The Mississippi Election Code now appears in a special pamphlet to the Mississippi Code of 1972, Annotated, and is codified by the sequential numbering of the sections of the Act in a single chapter of Code Title 23. Criminal sanctions for violations of certain election laws are described in Code Title 97, Miss. Code Ann. §§ 97-13-1 to 97-13-39 (1972). In contrast, the Code previously contained a hodgepodge of statutes that, while probably coherently ordered when originally enacted, had no apparent structure by 1986. Mississippi's election laws were spread over 11 chapters of the 1972 Code, and were further supplemented by a substantial body of law found in the Mississippi Code of 1942. This anomalous situation arose out of approval of certain legislative acts and disapproval of others by the United States Attorney General pursuant to his authority under the Voting Rights Act of 1965. *See* Jones v. Moorman, 327 So. 2d 298 (Miss. 1976)(repeal of primary election law ineffective unless approved as required by Voting Rights Act of 1965). The consequence of this patchwork collection of election laws could be seen in inconsistent and often contradictory statutes being followed in different kinds of elections: laws governing municipal elections were different from primaries for county or state-wide offices, which were different from general elections for the same offices. *See infra* text accompanying note 22.

[13] The Secretary of State of the State of Mississippi has the primary statutory responsibility for oversight of the State's election laws. Miss. Code Ann. § 7-3-5 (1972).

sippi's election law.[14] The Task Force, consisting of legislators, circuit clerks, election commissioners, representatives of the two major political parties and other at-large members, first met on June 20, 1984. With a generalized assignment to recodify Mississippi election law, the Task Force, chaired by Honorable Herman B. DeCell, attorney and former state senator from Yazoo City, was divided into subcommittees for the purpose of examining five subjects: voter registration, campaign practices, election administration, election day activities, and election code revision.[15]

The Task Force held public hearings on July 7, 1984, in each of the state's five congressional districts receiving testimony and written recommendations from a wide variety of interest groups.[16] These included representatives of the League of Women Voters, the Legal Services Administration, the State of Alabama, Common Cause, the United States Armed Services, the Mound Bayou Precinct Club, the Mississippi AFL-CIO, the Pass Christian Chamber of Commerce, the Mississippi Women's Political Caucus, several local election officials and a number of other individuals.[17] Based upon this testimony, the Task Force perceived a need to broaden its underlying assignment of

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[14] The Clarion-Ledger, June 20, 1984, at 8A, 3B (Task Force appointed to study election laws). The official correspondence, memoranda and reports produced by the Task Force were collected in conjunction with the writing of this paper and are on file in the Library of the University of Mississippi School of Law. Unless otherwise noted, such materials cited herein may be found in the Library [hereinafter TASK FORCE DOCUMENT (compiled 1987)].

[15] *See* Memorandum from Dick Molpus (June 20, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 1 (agenda for Task Force, organization and focus of Task Force, members of Task Force); *see also* The Clarion-Ledger, June 20, 1984, at 8A, 3B (editorial on progress promised in Task Force study).

[16] *See* Memorandum from Honorable Peyton D. Prospere, Assistant Secretary of State, State of Mississippi (Prospere) to members of the Election Law Reform Task Force (Task Force) (June 22, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 11 (revised list of members and timetable); Memorandum from Prospere to members of Task Force (July 3, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 19 (summary of suggestions made at public hearings and written submissions); *see also* The Northeast Mississippi Daily Journal, July 9, 1984, at 4 (public hearing on election law reform at Lafayette County Courthouse); The Sun/The Daily Herald, July 8, 1984, at A2 (grassroots opinions given by Gulf Coast residents on state voting laws).

[17] *See* I TASK FORCE DOCUMENT, *supra* note 14, at 19 (public hearings and summary of information received).

recodification and to undertake the task of rewriting substantial portions of then existing law.[18]

The task of recodification was then assigned to the election code revision subcommittee of the Task Force. Meetings of the Task Force were conducted with the members acting as a committee of the whole. After each subcommittee presented a report on suggested substantive changes, the entire Task Force set about to debate and develop a consensus as to each report.[19]

This "report and debate" process continued for several months. After each meeting, Honorable Peyton D. Prospere, the Assistant Secretary of State responsible for working with the Task Force, circulated memoranda listing issues about which consensus had been reached and those about which significant disagreement remained after each meeting.[20] By this means, the issues of genuine dispute were narrowed and the functioning of the Task Force made more efficient.

Several areas of agreement on major topics became evident early in the fact-finding process. Task Force members agreed, for example, that all elections in Mississippi ideally should be conducted by means of voting machines or electronic voting devices rather than by paper ballot. While disagreement remained as to the means and feasibility of financing the purchase of mechanized voting equipment as well as the time-table within which counties should implement the new mechanized procedures, Task Force members agreed that the election process

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[18] *See, e.g.*, Report of Election Day Activities Committee styled "Changes as Proposed by Committee" (undated)(attached to memorandum from Prospere to members of Task Force (July 20, 1984)) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 74 (summary of report by Election Day Activities Committee); Report of Voter Registration Committee (July 23, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 151 (recommendations by Voter Registration Committee on absentee ballots, registration, and purging).

[19] *See* Memorandum from Prospere to members of the Task Force (July 20, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 74 (reports and discussions of Task Force Committees; emphasis on Election Day Activities Committee).

[20] *See* Memorandum from Prospere to members of Task Force (Aug. 31, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 155 (summary of issues supported by consensus of Task Force; issues requiring additional research or analysis); Memorandum from Prospere to members of the Task Force (Sept. 4, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 170 (list of matters omitted from summary of issues distributed on 8-31-84).

stood to benefit greatly by the phasing out of hand-marked paper ballots.[21]

The Task Force also recognized the need to extend the length of the eleven hour voting day and its 7:00 a.m. to 6:00 p.m. schedule. Moreover, the Task Force sought to provide for uniform rules governing the election day distribution of campaign literature in proximity to polling places.[22]

On September 6, 1984, two representatives of the Voting Section of the United States Department of Justice Civil Rights Division (Justice Department) attended a meeting of the Task Force.[23] The visit served two important functions. First, the Justice Department representatives provided Task Force members with an overview of the functioning of the Voting Rights Act as well as their observations about the Justice Department's approval procedures should the bill drafted by the Task Force be later signed into law.[24] The visit also allowed the Justice Department an opportunity to observe firsthand the racial composition of the Task Force and the genuineness of the interaction between its members.[25] Although the significance, if any, to be attached to this exchange is impossible to assess, the visit certainly fostered an attitude of openness and candor important to the bill's ultimate prospects for approval by the Justice Department.

B. The Proposed Election Reform Act of 1985

Under the direction of the Office of the Secretary of State,

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[21] *See* Memorandum from Prospere to members of the Task Force (Aug. 31, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 155 (summary of issues supported by consensus of Task Force; issues requiring additional research or analysis).

[22] *Id.* Characteristic of the inconsistency of prior law was the rule that no campaigning would be allowed within 150 feet of a polling place during a primary election, while a separate statute provided only that "a space thirty feet in every direction from the polls . . . shall be kept open and clear . . . in general elections." MISS. CODE ANN. §§ 23-3-17 and 23-5-109 (1972).

[23] *See* Report styled "Action of Election Law Reform Task Force—Summary of Action" (Sept. 6, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 171 (introduction of representatives of U.S. Justice Dept.; overview of role of Voting Rights Section of the U.S. Justice Dept.; review of summary of issues).

[24] *Id.*

[25] *Id.*

counsel for the Task Force began the laborious task of drafting the various proposals into a single, comprehensive bill. The end result, styled "The Election Reform Act of 1985," was a 210-page product that was introduced on January 23, 1985, into both chambers of the Legislature.

The Senate version, Senate Bill 2689, was sponsored by Honorable Hob Bryan of Amory, Vice-Chairman of the Elections Committee of the Senate, and was referred to the Senate Elections Committee.[26] The House counterpart, House Bill 621, was sponsored by Honorable Tim Ford of Tupelo, Chairman of the Apportionment and Elections Committee of the House, as well as twelve other state representatives. The house bill was jointly referred to the House Apportionment and Elections Committee and the House Appropriations Committee.[27] Despite the seven months of arduous efforts by the Task Force, the auspicious beginnings for the Election Reform Act of 1985 proved to be short-lived with Senate Bill 2689 and House Bill 621 failing to pass out of their respective committees.[28]

Expanded use of the absentee ballot and establishment of a common qualifying date for independent and party candidates, both of which were recommended by the Task Force, were two principal components of the Election Reform Act of 1985[29] that had also been made the subject of separate bills in the State Senate. Senator Mitch Childre of Rankin County sponsored Senate Bill 2117, which, as proposed, would allow the spouse and dependents of physically incapacitated persons to vote by absentee ballot in certain instances.[30] Senator William Harpole of Lowndes County, Chairman of the Senate Elections Committee, sponsored Senate Bill 2514, which, as proposed, would require independents to qualify for an election at the same time as

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[26] 1985 Senate Journal 156-157.

[27] 1985 House Journal 74, 1180.

[28] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 2519; H.B. No. 621, Reg. Sess., Miss. Leg., 1985 - 1985 House Journal 1326.

[29] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 156-57; H.B. No. 621, Reg. Sess., Miss. Leg., 1985 - 1985 House Journal 74.

[30] *See* 1985 Senate Journal 27 (proposed amendment to MISS. CODE ANN. § 23-9-603 (1972)).

political party candidates.[31]

Both bills were referred to the Senate Elections Committee,[32] and they ultimately were referred out of committee[33] and approved on February 12, 1985, by the full Senate.[34] Once sent to the House of Representatives, however, Senate Bill 2112 and Senate Bill 2514 suffered the same fate as the House version of the more comprehensive Election Reform Act of 1985. Both bills failed to be reported out of the House Committee on Apportionment and Elections.[35]

C. The Joint Interim Study Committee on Elections of 1985

In the closing days of the 1985 Legislative Session, the Rules of the House of Representatives were suspended, and House Concurrent Resolution 177 was introduced proposing the creation of a Joint Interim Study Committee of the Mississippi Legislature whose task was to study the state's election laws, their reorganization and reform.[36] Based on this resolution, the Joint Interim Study Committee on Elections (the Joint Interim Committee) was formed by the appointment of members from both houses of the Legislature.[37]

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[31] *See* 1985 Senate Journal 123 (proposed amendment to MISS. CODE ANN. § 23-5-134 (1972)).

[32] *See* S.B. No. 2117, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 27 (introduced and referred to Senate Elections Committee, Jan. 8, 1985); S.B. No. 2514, Reg. Sess. Miss. Leg., 1985 - 1985 Senate Journal 123 (introduced and referred to Senate Elections Committee, Jan. 18, 1985).

[33] *See* S.B. No. 2117, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 219 (reported with recommendation to pass, February 5, 1985); S.B. No. 2514, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 219 (pass recommendation included).

[34] *See* S.B. No. 2117, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 335 (approved by full Senate); S.B. 2514, Reg. Sess., Miss. Leg., 1985 - 1985 Senate Journal 336-37 (approved by full Senate).

[35] *Compare* 1985 House Journal 1180 (neither S.B. No. 2117 nor S.B. No. 2514 reported out of House Committee on Apportionment and Elections) *with* 1985 House Journal 1185 (Election Reform Act of 1985 not reported out of committee).

[36] *See* H.C.R. 177, Reg. Sess., Miss. Leg., 1985, 1985 House Journal 835 (creating Joint Interim Study Committee to study reorganization and reform of State election law).

[37] *See* Memorandum from Herman B. DeCell to members of the Task Force (April 18, 1985) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 217 (no final action taken by legislature on Task Force proposals); Memorandum from Herman B. DeCell to members of the Task Force (Oct. 18, 1985) *contained in* I TASK FORCE DOCUMENT, *supra*

The Joint Interim Committee commissioned the drafting of a bill designed to reflect a "least change" posture, incorporating only those changes for which there was a clear consensus among the Task Force and legislators. The drafters of the newly designed bill sought to do little more than strike inconsistent or repetitive sections and collect the entire body of Mississippi election law into a single chapter of the Mississippi Code.[38]

The final proposal of the Joint Interim Committee, as filed in the 1986 Legislative Session, embodied several substantive changes in prior law.[39] It did not, however, incorporate many of the policy changes recommended by the Task Force and included in the 1985 bill. Perhaps most symptomatic of the difference in tone and magnitude between the 1985 bill and the 1986 version, which was finally enacted, are their respective titles. In 1985, the proposed legislation was styled the "Mississippi Election Reform Act of 1985."[40] The less ambitious title in 1986 was simply the "Mississippi Election Code."[41]

D. The Election Code of 1986.

The contents of the two bills reflect further differences. Omitted from the 1986 bill was the Task Force proposal that off-site voter registration be mandated at least annually in each county.[42] County circuit clerks were authorized in 1984 to take voter rolls to various precincts for purposes of voter registration.[43] Many circuit clerks, however, had not exercised this op-

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note 14, at 220 (meetings of legislative committees on elections; elections update).

[38] *See* Memorandum from Herman B. DeCell to Task Force (Oct. 18, 1985) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 220 (meetings of legislative committees on elections; elections update); Memorandum from Herman B. DeCell to Task Force (Jan. 30, 1985) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 208 (current status of Task Force recommendations in Mississippi Legislature).

[39] S.B. No. 2234, Reg. Sess., Miss. Leg., 1986 - 1986 Senate Journal 60; H.B. 341, Reg. Sess., Miss. Leg., 1986 - 1986 House Journal 38. *See infra* text accompanying notes 60-64.

[40] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 1.

[41] *E.g.*, S.B. No. 2234, Reg. Sess., Miss. Leg., 1986, § 1 (enacted as 1986 Miss. Laws, ch. 495, § 1; codified at MISS. CODE ANN. § 23-15-1 (Supp. 1987)).

[42] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 13.

[43] *See* 1984 Miss. Laws, ch. 457, § 5 (codified at MISS. CODE ANN. § 23-15-37 (Supp. 1987))(board of supervisors may authorize registrar to remove voter rolls in any voting precinct in county for purpose of voter registration).

tion. The 1985 bill sought to require such a step,[44] a mandate not reflected in the 1986 Election Code.[45]

During consideration of the election reform package, the campaign finance disclosure provisions sparked far more controversy than any other portion of the bills.[46] The differences of opinion quickly become evident when one compares the recommendations of the Task Force with the law as enacted.

The legislation proposed in 1985 would have required all candidates to identify any person who contributed more than $200 to a campaign.[47] The 1986 Election Code distinguishes between campaigns for statewide office and those for county or local office: it requires candidates at the statewide level to identify only those contributors who donate $500 or more to their campaigns, while candidates for lesser offices are required to identify only those contributors who give $200 or more.[48] Moreover, the 1985 bill would have prohibited Mississippi candidates from receiving contributions from any political action committee not registered with the Mississippi Secretary of State.[49] The 1986 Election Code contains no such provision.

In an attempt to enact another recommendation of the Task Force, the 1986 version, as reported to the full Senate, sought to place enforcement of the contribution disclosure provisions under the Mississippi Ethics Commission. Moreover, substantial opposition arose to the pending requirement that independent expenditures, those made to promote the election or defeat of a particular candidate but made without consultation or approval of a candidate, be identified and reported.[50]

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[44] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 13.

[45] MISS. CODE ANN. § 23-15-37 (Supp. 1987).

[46] *See* Memorandum from Herman B. DeCell to Task Force (Feb. 26, 1986) *contained in* I TASK FORCE DOCUMENT, supra note 14, at 223 (status of election reform legislation).

[47] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 251(1)(i).

[48] MISS. CODE ANN. § 23-15-807(c) (Supp. 1987).

[49] S.B. No. 2689, 1985 Reg. Sess., Miss. Leg., 1985, § 254.

[50] *See* Memorandum from Herman B. DeCell to members of the Task Force (Feb. 26, 1986) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 223 (status of election reform legislation). "Independent expenditures" are those "expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate . . . ." MISS. CODE ANN. § 23-15-801(j) (Supp. 1987). *See infra* note 122 and accompanying text.

As the Code was finally adopted, however, enforcement of the contribution disclosure provisions remains with the Secretary of State.[51] A substantial penalty is imposed for failure to comply with the disclosure provisions.[52] The 1986 Election Code as enacted does require that most independent expenditures be reported.[53]

One additional area in which the 1985 bill and the 1986 Election Code as finally enacted differ regards access to absentee ballots. During its hearings, the Task Force received as much comment on this topic as any other issue.[54] The final proposal of the Task Force provided, among other things, that absentee ballots would be available to anyone who would be outside his county of residence or fifty miles or more away from his residence on election day due to vacation or while tending to a hospitalized family member.[55] The 1986 Election Code retains the provision allowing a voter to cast an absentee ballot if away from home while caring for a hospitalized dependent. It deletes, however, the provision that a vacationing voter might be entitled to that privilege.[56]

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[51] MISS. CODE ANN. § 23-15-813 (Supp. 1987). *See infra* note 123 and accompanying text. The amendment changing this enforcement authority from the Mississippi Ethics Commission to the Secretary of State was adopted on January 30, 1986, on the Senate floor by voice vote. 1986 Senate Journal 280-81.

[52] *See* MISS. CODE ANN. § 23-15-811 (Supp. 1987)(willful violation of provisions of campaign finance disclosure article is misdemeanor punishable by fine of up to $3,000.00); MISS. CODE ANN. § 23-15-813 (Supp. 1987)(non-complying political committee subject to fine not to exceed $100.00 or 10% of contributions or expenditures required to be reported, whichever is greater, for each violation).

[53] MISS. CODE ANN. § 23-15-809 (Supp. 1987).

[54] *See* Letter from Arlen B. Coyle to Honorable Dick Molpus (June 19, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 21 (suggested remedial measures for Mississippi voting-rights laws); Letter from Ben M. Caldwell to Herman B. DeCell (July 12, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 28 (suggested changes in Mississippi election laws); Written testimony of Neva F. Greenwald, President, League of Women Voters in Mississippi (July 7, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 35 (same); Letter from Joe W. Martin, Jr. to Honorable Peyton D. Prospere (July 6, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 63 (same); *see also* The Sun/The Daily Herald, July 8, 1984 at A2 *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 73 (grassroots opinions of Gulf Coast residents on state voting laws).

[55] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, §§ 204(5), 205.

[56] *See* MISS. CODE ANN. § 23-15-627 (Supp. 1987)(model absentee ballot application); MISS. CODE ANN. § 23-15-713 (Supp. 1987)(persons qualified to vote as absentees).

In the one blatantly partisan coup attempted by the Task Force, the overwhelmingly Democrat group successfully incorporated provisions designed to prevent the growth of other political parties.[57] The offending provisions dealt with the order in which candidates' names would appear on general election ballots[58] and a prospective voter's eligibility to participate in primary elections.[59]

As proposed by the Task Force, the election commission for each county would have been required to place the name of the Democratic nominee first on every ballot. Senate Bill 2689 would have accomplished this result by the clever requirement that "the names of candidates of the major party which holds the greater number of offices elected statewide . . . be listed first."[60] The Election Code simply retains the language of prior law, which provides that the arrangement of candidates' names "need not be uniform."[61]

Regarding a voter's eligibility to participate in party primaries, the Task Force and Senate Bill 2689 sought to restrict primaries to "bona fide" members of a political party or voters declaring "allegiance" to the political party prior to voting in a primary.[62] Mississippi's electorate is not registered according to party affiliation, and no statutory scheme exists for determining party membership. As a result, the proposed means for enforcing the provisions of section 189 in the 1985 bill remains a mystery. The 1986 Code, reenacting prior law that a primary voter must have the "intention" of supporting the party's nominees in the

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[57] *See* Memorandum from Prospere to members of the Task Force and attachments (Dec. 3, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 193 (summary of recommendations of Task Force); Letter from Claude Ramsey to Peyton D. Prospere (July 9, 1984) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 32 (suggested remedial measures for present Mississippi voting laws). The Task Force, consisting of 25 members, had only two Republican members, the remaining body of the Task Force being made up of Democrat elected officials or others associated with the Mississippi Democratic Party in some official position.

[58] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 105.

[59] *Id.* at § 189.

[60] *Id.* at § 105.

[61] *See* MISS. CODE ANN. § 23-15-367 (Supp. 1987)(reincorporating language from MISS. CODE ANN. § 3263 (1942)).

[62] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 189.

general election does not go so far.[63]

Although ostensibly better, even this limitation is probably unconstitutional. While it is permissible for a political party to impose such restrictions by internal rules, a state may not. A political party is allowed to open its primaries as broadly as it wishes, a right protected by the first amendment.[64]

Finally, the Task Force proposal regarding election day distribution of campaign literature did not find its way into the new Code. The 1985 bill provided that campaigning be forbidden within 300 feet of polling places on election day.[65] The Legislature simply readopted the restriction for primary elections found in prior law, requiring a campaign free space of 150 feet from polling places.[66] The 1986 bill was signed into law on April 16, 1986.[67] The Act provided that it would become effective from and after January 1, 1987, pending approval under the Voting Rights Act.[68]

The 1986 bill as finally adopted, Chapter 495 of the 1986 Mississippi Session Laws and its supporting documentation, was finally submitted on November 3, 1986, to the United States Justice Department for its review and approval. On December 31, 1986, Honorable Edwin Lloyd Pittman, Attorney General of Mississippi, received notification that the Department of Justice

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[63] Miss. Code Ann. § 23-15-575 (Supp. 1987)(derived in part from Miss. Code Ann. § 3129 (1942)).

[64] Tashjian v. Republican Party of Connecticut, 479 U.S. ___, 107 S. Ct. 544 (1986). The Mississippi Supreme Court recognized several years ago that constitutional rights were threatened by the predecessor section to § 23-15-575. In Bowen v. Williams, 238 Miss. 57, 117 So. 2d 710 (1960), the Court noted that Miss. Code Ann. § 3129 (1942) "may present some problems for solution." 238 Miss. at 62, 117 So. 2d at 712 (citing with approval Westerman v. Mims, 111 Tex. 29, 37, 227 S.W. 178, 181 (1921), where the Texas Supreme Court noted that the obligation placed upon a voter by a Texas statute essentially identical to Section 3129 is only a "moral obligation"). *See also* Kirksey v. Board of Supervisors of Hinds County, Mississippi, 554 F.2d 139, 144, 152 (5th Cir.), *cert. denied.* 434 U.S. 968 (1977) (former Code § 3129 apparently included description of "segregation principles" adopted to preclude black voters from participating in party primaries).

[65] S.B. No. 2689, Reg. Sess., Miss. Leg., 1985, § 286.

[66] Miss. Code Ann. § 23-15-895 (Supp. 1987)(derived from Miss. Code Ann. § 23-3-17 (1972)).

[67] *See* 1986 Miss. Laws, ch. 495 (S.B. No. 2234 enacted as "Mississippi Election Code").

[68] *Id.* at § 350; *see* Miss. Code Ann., Editor's Note preceding § 23-15-1 (Supp. 1987)(provisions for sections 349 and 350, chapter 495, Mississippi Laws of 1986).

would interpose no objection to most of the new Election Code. The department delayed, however, its pre-clearance of the three sections mandating common qualification deadlines for independent and party candidates.[69] Two days later, the Justice Department, on January 2, 1987, noted its non-opposition to these three sections of the Act, allowing the entire Election Code to be effectuated.[70]

II. Major Changes in the Mississippi Election Code of 1986

Despite the "least change" mentality of the Legislature in revising Mississippi election law, several major substantive changes did occur. These changes are most clearly seen in the new Code articles entitled "Voting Systems,"[71] "Conduct of Elections,"[72] "Absentee Ballots,"[73] "Disclosure of Campaign Finances,"[74] and "Mississippi Presidential Preference Primary and Delegate Selection."[75]

A. Voting Systems

The 1986 Election Code requires that each county provide modern-day alternatives to paper ballots by January 1, 1989.[76] Specifically, the Election Code requires that all elections held after that date utilize voting machines, electronic voting systems, or optical mark reading equipment, each of which is more

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[69] *See* Letter from Gerald W. Jones to Honorable Edwin Lloyd Pittman (Dec. 31, 1986) *contained in* I Task Force Document, *supra* note 14, at 234 (United States Attorney General's views on proposed revisions); *see also* 1986 Miss. Laws, ch. 495, §§ 109, 110, and 336 (common qualifying dates for independent candidates and candidates for party nomination for federal, state, and county offices and for municipal office)(codified after approval at Miss. Code Ann. §§ 23-15-359, 23-15-361 and at Editor's Note preceding § 23-15-1 (Supp. 1987)).

[70] *See* Letter from Gerald W. Jones to Honorable Edwin Lloyd Pittman (Jan. 2, 1987) *contained in* II Task Force Document, *supra* note 14, at 235 (Attorney General's approval of S.B. No. 2234, ch. 495 (1986) §§ 109, 110, 336).

[71] Miss. Code Ann. § 23-15-15 (Supp. 1987).

[72] *Id.* at § 23-15-17.

[73] *Id.* at § 23-15-19.

[74] *Id.* at § 23-15-23.

[75] *Id.* at § 23-15-37.

[76] *Id.* at § 23-15-391.

fully described in the Code.[77] The Code does permit the use of paper ballots where a county's election commissioners have determined that a particular election would be less expensive if paper ballots were used.[78]

The Task Force early recognized the need for modernized voting systems statewide.[79] A statewide study of county balloting procedures authorized by the Task Force found that forty-nine counties still relied upon paper ballots as the exclusive or primary means for conducting elections.[80] Besides concluding that modern voting devices would create a cost saving for each county, the Task Force also noted the benefits to be derived from the reduced amount of time required to count ballots and the decreased possibilities of voter fraud.[81]

The Election Code requires, as did its predecessor, that all managers and clerks who are appointed to work at precincts with voting machines first attend a formal training session and receive instruction about the use of the machines.[82] Designed to help ensure proper conduct during elections, this provision also protects the integrity of the election process.

Allowed as an alternative to voting machines are two other modern-day systems. Both systems were optional voting devices authorized by the Legislature before automated systems were mandated. The first of these, described by the Code as "Electronic Voting Systems," denominates those voting and counting devices that operate primarily by the use of punch cards.[83] Man-

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[77] *Id*; *see* MISS. CODE ANN. §§ 23-15-401 to -451 (Supp. 1987)(rules for maintaining and using voting machines); MISS. CODE ANN. §§ 23-15-461 to -485 (Supp. 1987)(defining procedures for use of electronic voting systems); MISS. CODE ANN. §§ 23-15-501 to -525 (Supp. 1987)(explanatory material for use of optical mark reading equipment).

[78] MISS. CODE ANN. § 23-15-391 (Supp. 1987).

[79] *See supra* text accompanying note 21.

[80] *See* Report to Task Force styled "Summary Analysis of Converting to Non-Paper Ballot, State Wide Preliminary" *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 226 (study of non-paper balloting commissioned by Election Law Reform Task Force). This report is noteworthy also for its preliminary research into the relative costs associated with the use of paper ballots versus the acquisition and use of voting machines or their equivalent. *Id.*

[81] *Id.*

[82] MISS. CODE ANN. § 23-15-417 (Supp. 1987)(derived from MISS. CODE ANN. § 23-7-17 (1972)).

[83] MISS. CODE ANN. §§ 23-15-461 to -485 (Supp. 1987)(derived from MISS. CODE ANN.

agers and clerks at precincts utilizing electronic voting systems, like their counterparts at precincts using voting machines, must attend training and instruction sessions before being qualified to serve.[84]

The other type of system authorized by the 1986 Election Code is called Optical Mark Reading Equipment (OMR).[85] Optical mark reading equipment makes use of paper ballots not dissimilar from those currently in use. The improvement offered by OMR devices, however, lies in the speed and security with which ballots may be counted.

Voters in precincts using OMR equipment will be handed a ballot and a marking device. Voters will be instructed to mark their ballots in a fashion customarily used in standardized tests: a small circle, square or oval adjacent to a candidate's name will be filled in by the voter using the marking device provided at the polling place. The OMR equipment, designed to "read" marks made by certain writing devices, scans the ballots as they are counted and automatically records the results.

The Code provides that a "resolution board" must convene to ensure that ballots counted by OMR equipment are not improperly rejected. Whenever a ballot is recorded as being "blank," the resolution board must examine the ballot to determine whether the ballot is blank or was marked with a writing device to which the OMR equipment was not sensitive.[86] If the ballot is marked, but with a nondetectible device, the resolution board may mark over the original mark with a detectible device and then count the ballot.[87]

B. Conduct of Elections

The 1986 Election Code mandates a number of changes in election day practices. Voting hours are extended by one hour,

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§§ 23-7-301 to -385 (1972)).

[84] MISS. CODE ANN. § 23-15-475 (Supp. 1987).

[85] MISS. CODE ANN. §§ 23-15-501 to -525 (Supp. 1987)(derived from MISS. CODE ANN. §§ 23-7-501 to -525 (1972)).

[86] MISS. CODE ANN. § 23-15-523 (Supp. 1987). The resolution board, appointed by the election commissioners, is to be comprised of "counting center employees, members of the public or qualified electors." *Id.*

[87] *Id.*

with all polls hereafter being open from 7:00 a.m. until 7:00 p.m. on election day.[88]

The Code also brings Mississippi law into compliance with the Voting Rights Act as regards assistance to voters.[89] Formerly, Mississippi law purported to require a blind, disabled or illiterate voter to be assisted in the marking of his ballot by an election manager "or other person of [the voter's] own selection."[90] Federal law, however, requires that a voter declaring his need for assistance be aided "by a person of the voter's choice. . ."[91] Thus, a voter should no longer be confronted with a choice between a manager of the election and someone else.

In response to a novel approach to turning out the vote, the Election Code now forbids a candidate's offering money or prizes to encourage participation in an election.[92] In September of 1984, Ellis L. Prestage, while running for County Supervisor of Bolivar County, devised a method to increase voter turnout. The substance of Prestage's proposal was that any person who voted on election day would be eligible to participate in a lottery drawing yielding prizes that totaled $2,000.00 in cash, regardless of the candidate for whom a ballot was cast.[93] Prestage won the

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[88] *See* MISS. CODE ANN. § 23-15-541 (Supp. 1987)(amending former MISS. CODE ANN. §§ 23-3-13 and 23-5-147 (1972)).

[89] MISS. CODE ANN. § 23-15-549 (Supp. 1987). This section reflects necessary changes in MISS. CODE ANN. § 23-5-157 (1972), dealing with blind or otherwise physically disabled voters and MISS. CODE ANN. § 3273 (1942), which concerns illiterate voters. *Cf.* 42 U.S.C. § 1973 aa-6 (Supp. 1987)(blind or illiterate voter may not receive assistance from employer, agent of employer, or office or agent of his union).

[90] MISS. CODE ANN. § 23-5-157 (1972). The Mississippi Supreme Court found section 23-5-157 satisfied both the Voting Rights Act of 1965 and constitutional muster. *See* O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977)(en banc)(statutory provision providing for aid to illiterate, blind, and disabled voters conforms with Voting Rights Act), *cert. denied*, 435 U.S. 934 (1978). *O'Neal* also provides that the provision that a voter "declare" his disability is mandatory, requiring that a voter affirmatively request assistance and that assistance be rendered *only* to those voters who are blind, disabled or illiterate. 350 So. 2d at 1008-09. Presumably this language survives the minor changes in the statute wrought by the 1986 Act.

[91] 42 U.S.C. § 1973 aa-6 (Supp. 1987). This provision, however, states that a blind or illiterate voter may not receive assistance from his employer, an agent of his employer, or an officer or agent of his union. *Id.*

[92] MISS. CODE ANN. § 23-15-561 (Supp. 1987).

[93] Naron v. Prestage, 469 So. 2d 83 (Miss. 1985). Eleven voters were winners in Prestage's drawing. The first ten voters whose entry cards were drawn received $100.00 each, while the eleventh won $1,000.00.

election, held his lottery, and survived the ensuing election contest.[94]

The Mississippi Supreme Court frowned upon Prestage's scheme, noting that it was "undesirable" as a matter of public policy.[95] Nonetheless, the Court held that the cash drawing was legal.[96] The 1986 Session of the Legislature promptly banned the practice by adding a section to the new Code to prevent a repeat of the plebiscite jackpot drawing.[97]

One significant improvement in the 1986 Election Code concerns the prevention of unlawful voting practices. Under prior law practice, poll watchers were given little guidance in determining when a voter, suspected to be ineligible, should be challenged.[98] The Code now identifies who is qualified to challenge suspected ineligible voters and the specific grounds upon which a challenge may be made.[99]

Unfortunately, because the 1986 Election Code represents the merger of new provisions with the bulk of prior law, some confusion is likely to arise in the area of vote challenges. The new Code provides that "authorized challengers . . . shall be allowed to challenge the qualifications of any person" who attempts to vote.[100] The term "authorized challengers" includes a candidate whose name is on the ballot, an official poll watcher for the candidate, an official poll watcher of a political party, any qualified elector from the precinct in which the challenge is made, or any manager, clerk or poll worker at the polling place.[101]

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[94] *Id.* at 85.

[95] *Id.* at 86-88.

[96] *Id.*

[97] MISS. CODE ANN. § 23-15-561 (Supp. 1987).

[98] *See* MISS. CODE ANN. § 3128 (1942)(each candidate or his representative has right to be present at polling place).

[99] *Id.* § 23-15-571 (Supp. 1987).

[100] *Id.* § 23-15-571(1) (Supp. 1987).

[101] *Id.* Challenges may be brought against a voter for the following reasons:

(a) not a registered voter in the precinct;

(b) not the registered voter under whose name he has applied to vote;

(c) has already voted in the election;

(d) not a resident in the precinct where registered;

(e) has illegally registered to vote;

(f) has removed the ballot from the polling place; or

The 1986 Code section identifying those who may challenge a voter's qualifications is new. Incorporated from the previously existing scheme, however, is a provision that appears to be inconsistent. Section 23-15-245 of the Code provides that the duties of the election bailiff include allowing: *two (2) challengers of good conduct and behavior, selected by each party to detect and challenge illegal* voters . . . .[102] This provision, derived from that portion of the prior law regulating general elections,[103] apparently missed the technical amendment made to a related section, which now provides that election officers and "those authorized by Section 23-15-577" may be allowed to remain in the polling place.[104]

The Code section concerning voter challenges also incorporates a prior provision that challenges properly made must be considered and acted upon by election managers.[105] Although not a new grant of authority, election managers are authorized to examine under oath any person attempting to vote in order to determine that voter's qualifications as an elector.[106] It would appear, then, that compliance with section 23-15-571(2) requires, at a minimum, that election managers allow an authorized challenger the opportunity to state the basis of the challenge, and, if the stated challenge has *prima facie* validity,[107] that they place the elector under oath and examine him about the allegations of incapacity raised by the authorized challenger.

(g) is otherwise disqualified by law.

MISS. CODE ANN. § 23-15-571(3) (Supp. 1987). *See* Miss. Const. § 241 (1890) and MISS. CODE ANN. § 23-15-19 (Supp. 1987) (list of crimes that render one convicted ineligible to register to vote).

[102] MISS. CODE ANN. § 23-15-245 (Supp. 1987)(emphasis added). At least one court has construed this provision as limiting challengers to those appointed by political parties. *See* James v. Humphreys Co. Bd. of Election Comm'rs, 384 F. Supp. 114, 120 n.6 (N.D. Miss. 1974)(exclusion of poll watchers did not justify voiding election).

[103] MISS. CODE ANN. § 23-5-109 (1972).

[104] MISS. CODE ANN. § 23-15-551 (Supp. 1987)(derived from MISS. CODE ANN. § 23-5-151 (1972)).

[105] MISS. CODE ANN. § 23-15-571(2)(Supp. 1987)(derived from MISS. CODE ANN. § 23-1-41 (1972)).

[106] MISS. CODE ANN. § 23-15-233 (Supp. 1987)(derived from MISS. CODE ANN. § 23-5-101 (1972)).

[107] MISS. CODE ANN. § 23-15-79 (Supp. 1987). Election managers are authorized to reject frivolous or bad faith challenges. *Id.*

Section 23-15-579 tracks prior law in outlining the procedure for preserving the ballot of a challenged voter.[108]

C. *Absentee Ballots*

The 1986 Election Code made two major changes in the area of access to absentee ballots. By virtue of the new Act, any voter (a) over sixty-five years of age, or (b) who would be required to be outside the county of his residence or more than fifty miles from his residence as a result of the hospitalization of a family member is eligible to cast an absentee ballot.[109] The first change since having been rescinded,[110] the Code now contains only a single substantive change in the description of those eligible to receive absentee ballots.[111]

Although the 1986 Code only slightly changed the eligibility requirements for absentee ballots, it incorporated several new absentee balloting procedures. First, a disabled voter seeking to cast an absentee ballot is no longer required to do so in the presence of a notary public. The law now provides simply that the "attesting witness" requirement may be satisfied by anyone who is over eighteen years of age.[112]

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[108] *See* MISS. CODE ANN. § 23-3-25 (1972)(all challenged votes to be received, marked as challenged and separated from unchallenged votes).

[109] 1986 Miss. Laws, ch. 495, § 230(e) and (f)(codified at MISS. CODE ANN. § 23-15-713 (Supp. 1987)).

[110] The 1987 session of the legislature deleted the provision authorizing voters over the age of 65 to vote by means of absentee ballot. *See* 1987 Miss. Laws, ch. 499, § 13 (approval by the Voting Section of the United States Department of Justice Civil Rights Division pending); *see also* Letter from Gerald W. Jones to Honorable Edwin Lloyd Pittman (July 24, 1987) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 236 (request for additional information to enable United States Department of Justice Civil Rights Division to determine if proposed change would have effect of denying or abridging right to vote on account of race or color).

[111] One description has been slightly amended in the new Code. Previously, a voter who was "sick or physically unable to go to the polls on election day" was entitled to obtain an absentee ballot. *Id.* That provision has been changed to provide that any voter who has a "temporary or permanent physical disability" is qualified to vote as an absentee. MISS. CODE ANN. § 23-15-713(d) (Supp. 1987).

[112] MISS. CODE ANN. § 23-15-721(2) (Supp. 1987). Remarkably, the original version of the 1986 Code provided that voters under physical disability need not even obtain the signature of an attesting witness. MISS. CODE ANN. § 23-15-631(c) (Supp. 1987). *Cf.* Fouche' v. Ragland, 424 So. 2d 559, 560-61 (Miss. 1982) (noting importance of attesting witness provision). The technical corrections made by the 1987 session of the legislature

Although previously required to return absentee ballots by 5:00 p.m. on the second day preceding an election,[113] voters who cast absentee ballots in person must now do so by 12:00 noon on the Saturday preceding Tuesday elections.[114] Voters mailing absentee ballots are granted an additional few hours for the U.S. Postal Service to operate, such ballots now being required by 5:00 p.m. on the day preceding the election[115] rather than by 12:00 noon on the day preceding the election.[116]

Finally, voters with a permanent physical disability are now provided a means by which they may automatically receive absentee ballots as elections draw near.[117] By submitting a physician's affidavit indicating that the voter is permanently physically disabled, an applicant automatically becomes entitled to receive subsequent absentee ballots on a continuing basis without reapplying.[118]

D. Disclosure of Campaign Finances

Mississippi's "Corrupt Practices Law of 1935" (Corrupt Practices Law)[119] had long required that candidates file reports detailing certain contributions and expenditures. The 1986 Election Code now contains, however, a more comprehensive system of regulation of campaign finances.[120] One of the primary changes in this area is the specific inclusion of political action committees, commonly known as "PACs", with several other

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deleted this singular privilege. *See* 1987 Miss. Laws, ch. 499, § 12 (approved by the Voting Section of the United States Department of Justice Civil Rights Division on July 24, 1987; *see* Letter from Gerald W. Jones to Honorable Edwin Lloyd Pittman (July 24, 1987) *contained in* I TASK FORCE DOCUMENT, *supra* note 14, at 236 (stating that Attorney General did not interpose any objections to specified changes, except for repeal of provisions concerning absentee voting by persons 65 years of age or older).

[113] MISS. CODE ANN. § 23-9-415 (1972).

[114] *Id.* at § 23-15-637 (Supp. 1987).

[115] *Id.*

[116] *Id.* at § 23-9-415 (1972).

[117] *Id.* at § 23-15-629 (Supp. 1987).

[118] *Id.* at § 23-15-629(1), (2) (Supp. 1987).

[119] *Id.* at §§ 23-3-1 to -71 (1972).

[120] *Id.* at §§ 23-15-801 to -815 (Supp. 1987). Candidates, of course, are still required to report contributions and expenditures above a certain level, depending upon the type of office to which a candidate is seeking election. MISS. CODE ANN. § 23-15-807 (Supp. 1987). These requirements do not differ a great deal from prior practice.

types of organizations in the definition of "political committee."[121] While this change sparked a considerable amount of controversy,[122] it does not represent a significant departure from prior law.

Under the old Corrupt Practices Law, "political committees" were required to report contributions in excess of $500 to statewide candidates and in excess of $200 to other candidates.[123] Similarly, political committees were previously required to report campaign expenditures in excess of $250 to any single entity within thirty days after any election.[124] The prior definition of "political committee" probably was broad enough to encompass modern day PACs, even though "political action committees" were not, as they now are, expressly included in the definition:

> "Political committee" shall mean any committee, association, party or other organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the action of voters for or against the nomination for election or election of one (1) or more candidates.[125]

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[121] MISS. CODE ANN. § 23-15-801(c) (Supp. 1987). A "political committee" includes any PAC or similar organization that receives contributions in excess of $200.00 during a calendar year or makes expenditures in excess of that amount during the same period of time "for the purpose of influencing or attempting to influence the action of voters for or against the nomination for election, or election, of one or more candidates, or balloted measures." *Id.*

[122] *See supra* text accompanying notes 35-42.

[123] *See* MISS. CODE ANN. § 23-3-41(2) (1972)(requiring political committees to report contributions made to committee in stated amounts for expenditure in influencing nomination or election of specific candidate).

[124] *See* MISS. CODE ANN. § 23-3-43(2) (1972) (requiring political committee to file itemized statement of each expenditure made in support of or in opposition to any candidate, statement of purpose of each expenditure, and disclosure of person to whom such expenditure was made with Secretary of State).

[125] MISS. CODE ANN. § 23-3-41(1)(b) (1972). The inclusion of political committees in the scheme of regulations requiring contribution and expenditure disclosure first occurred in the 1978 Session of the State Legislature. The preamble of the bill giving rise to that change indicates that the concerns for integrity, fairness and full disclosure that gave rise to the 1986 Election Code are not new:

> WHEREAS, the people have a right to expect from their elected representatives at all levels of government the utmost in integrity, honesty and fairness in their dealings; and
>
> WHEREAS, the people further have a right, in order to vote knowledgeably, to true and timely disclosure of the identity of financial backers and the

Thus, PACs making contributions or expenditures to influence Mississippi campaigns have been subject to disclosure requirements, knowingly or not, since 1978.

Finance disclosure changes implemented by the 1986 Election Code are three: (1) political committees must now file a statement of organization with the Secretary of State within 10 days of being formed;[126] (2) expenditures, like contributions, now must be reported prior to any election and the reporting dates for contributions and expenditures are amended;[127] and (3) the levels of contributions and expenditures at which a committee's reporting responsibilities are triggered have been altered.[128]

The Code provides that a disclosure statement must identify each person[129] or political committee *making a contribution* in excess of $200 to a candidate for an office other than statewide office or in excess of $500 when made to a candidate for statewide office or office elected by Supreme Court district.[130] In what appears to be a parallel provision regarding expenditures, the Code requires that a report identify any person or organization who *receives an expenditure* in excess of $200 *from a political committee* or candidate for local office, or in excess of $200 when received from a candidate for statewide or Supreme Court

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extent of financial support for candidates for political office; [the contribution and expenditure requirements of the Corrupt Practices Act are amended to impose similar requirements upon "political committees."]

H.B. No. 77, Reg. Sess., Miss. Leg., 1978 (enacted as 1978 Miss. Laws, ch. 479). *See generally* Wallace & Stamps, *Corporate Free Speech and Campaign Finance In Mississippi*, 49 Miss. L.J. 819 (1978)(review of Mississippi law prohibiting contributions to political candidates from corporations).

[126] Miss. Code Ann. § 23-15-803 (Supp. 1987). Statements of organization must include the identification of the committee and its officers, a designation of a director and bookkeeper as treasurer, and the identification of any candidate for whom the committee is authorized to act. *Id.*

[127] Miss. Code. Ann. § 23-15-807(b) (Supp. 1987). Candidates and political committees that make expenditures to influence elections shall file pre-election reports in scheduled election years and annual expenditure reports beginning in 1987. *Id.*

[128] *See* Miss. Code Ann. § 23-15-807(c)(ii) (Supp. 1987)(requiring identification of each person making contribution to or receiving expenditure from political committees which have aggregate amount in excess of $200.00).

[129] Miss. Code Ann. § 23-15-801(i) (Supp. 1987). The word "person" is expressly defined as including an individual, corporation or other legal entity. *Id.*

[130] *Id.* at § 23-15-807(c)(ii)(l) (Supp. 1987).

district office.[131]

Thus far, the text of the statute appears to create no confusion. Reference to the definitional section, however, indicates that the word "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, *gift of money or anything of value*, made by any person or political committee for the purpose of influencing any balloted measure or election . . ."[132] When read in conjunction with the Code section enumerating the contents of disclosure statements, the definitional provision leads to the conclusion that a political committee must identify each candidate to whom it has paid "a gift of money" in excess of $200, regardless of whether he is a candidate for statewide office.[133] Although perhaps not intended by the Legislature, these new Code provisions effectively require that *any candidate* receiving a contribution in excess of $200 from *any political committee* be identified regardless of the $500 non-reportable maximum allowed for contributions to statewide candidates by individuals or corporations.[134] If, indeed, it was not the intention of the Legislature that identification of beneficiaries of payments from political committees be required at the $200 level in every campaign, the definitional statute should be amended to provide that expenditure shall not include a "contribution" as defined in Section 23-15-801(e)(ii).

Finally, the 1986 Election Code creates a mechanism by which independent expenditures are to be reported when they exceed $200 during a calendar year.[135] It also provides for administrative hearings and penalties for failure to comply with any portion of the article regulating campaign finance disclosures. [136]

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[131] *Id.* at § 23-15-807(c)(ii)(2) (Supp. 1987).

[132] *Id.* at § 23-15-801(f)(i) (Supp. 1987).

[133] *Id.* at § 23-15-801(c)(ii)(2) (Supp. 1987).

[134] *Id.* at § 23-15-807(c)(ii) (Supp. 1987).

[135] *Id.* at § 23-15-809 (Supp. 1987). The statement must disclose the name of the individual making the expenditure, information relating to the candidate involved, and the identification of each person contributing in excess of $200.00 for the purpose of furthering the independent expenditure. *Id.*

[136] *Id.* at § 23-15-813 (Supp. 1987). Upon a finding of failure to comply with the article, the hearing officer shall impose a penalty not to exceed $100.00 or 10% of the total amount of each violation. *Id.*

E. Mississippi Presidential Preference Primary and Delegate Selection

That portion of the 1986 Election Code designed to allow the State to exercise greater influence in national politics is Article 37, dealing with presidential primaries and delegate selection.[137]

The Presidential Preference Primary is scheduled to be held during presidential election years on the second Tuesday in March.[138] Any party sponsoring a Presidential Preference Primary must also conduct its congressional and senatorial primaries on the second Tuesday of March.[139] This scheduling represents a marked departure from past practice, as Mississippi law otherwise provides for congressional primaries in June.[140]

The new time-lines will have at least one immediate effect on national politics. Mississippi and other southern states almost certainly will be the beneficiaries of increased attention, expenditures and campaign visits before the early spring presidential primary. On the home front, however, Mississippians will hardly be allowed time to catch a breath after statewide elections in November every four years before being subject to the onslaught of congressional, senatorial and presidential primary campaigns which begin only four months later.[141]

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[137] *Id.* at §§ 23-15-1081 to -1097 (Supp. 1987). In an effort to exercise greater control over the nomination of presidential candidates, the legislatures of several deep south states, including Mississippi, have created a provision by which presidential primaries may be held in the early spring during presidential election years. *See, e.g.*, MISS. CODE ANN. § 23-15-1081 (Supp. 1987)(presidential preference primaries; electors may vote in primary of only one party). A party must have garnered more than 20% of the total vote cast for President and Vice-President in the previous presidential election in order to be qualified to conduct a presidential preference primary in Mississippi. *Id.*

[138] *See* MISS. CODE ANN. § 23-15-1081 (Supp. 1987)(no elector may vote in primary of more than one political party in same presidential preference primary).

[139] *See* MISS. CODE ANN. § 23-15-1083 (Supp. 1987)(if second congressional primary is necessary, it shall be held three weeks thereafter).

[140] *See* MISS. CODE ANN. § 23-15-1031 (Supp. 1987)(except as provided in § 23-15-1081, first primary for congressmen shall be held on first Tuesday in June of years in which congressional elections are held).

[141] MISS. CODE ANN. §§ 23-15-191 and 23-15-193 (Supp. 1987). The statewide election year/presidential election year cycle is even more grueling than it appears at first blush. In statewide election years, Mississippi holds party primaries in August followed by general elections in November. If any of the State's political parties has slated a presidential preference primary for the next year, that party's congressional, senatorial and

E. Miscellaneous Provisions

1. Deadline for Qualification of Independent Candidates

Prior to the adoption of the 1986 Election Code, Mississippi law had long granted special dispensation to candidates not running under party banners. Independent candidates previously had a longer time within which to qualify for the general election beyond that which was allowed candidates for party nominations.[142] As a consequence, of course, many candidates waited until after party nominees were determined before deciding whether to enter a race.

The conventional wisdom was that the extended qualification date inured to the benefit of black candidates. Faced with this proposition, and the natural reluctance to tamper with the system if the thesis were true, the Voting Section of the United States Department of Justice Civil Rights Division requested that an empirical study be made to determine the value of the late qualification deadline to black independent candidates. The resulting study, a masterpiece of primary research, indicated that although one-third of the candidates for major public office in Mississippi between the years 1982 and 1986 were black in-

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presidential hopefuls will vie for top spot in March primaries. The general election in that year, of course, will be held in November. MISS. CODE ANN. § 23-15-781 (Supp. 1987). Not to appear slack in its attention to the political process, Mississippi's electoral scheme goes even further.

In years following presidential election years, almost every municipality in the state holds its mayoral and aldermanic election, the primaries of which are held in May followed by general elections in June. Thus, in election cycles including a presidential election year in which the new presidential preference primary law has been invoked, Mississippians will find themselves faced with election days from August of one year through June two years later, with a maximum break between major elections of only seven months. In view of the tenacious campaign efforts for which many candidates have now become known, the end result of such a cycle is 23 consecutive months of campaigning!

The clear import of this result is that Mississippi's elections should be combined. In the interest of efficiency and reduction of voter fatigue, statewide and federal elections should be combined and be held in even-numbered election years as are those in the vast majority of the states. *See* D. Dean, *Election Study of the 50 States: Executive Summary* at 37-46 (1982) *contained in* II TASK FORCE DOCUMENT, *supra* note 14, at 37-46 (review and discussion of various state election dates).

[142] 1978 Miss. Laws, ch. 429, § 1. The deadline for qualification of independent candidates was not less than 60 days prior to the election, the same time that candidates in the political primaries were required to qualify. *Id.*

dependents, the extended qualification deadline had no noticeable effect on their success rate.[143]

The 1986 Election Code contains the sensible provision that independent candidates should qualify at the same time as candidates for party nomination.[144]

2. Precinct Managers, Clerks and Bailiffs

Reduction of the number of poll workers and formal training of those who remain are mandated by the 1986 Election Code. Former election day practice statutes included provisions that required election commissioners to appoint three managers at each precinct.[145] The managers were then given the responsibility of appointing two "clerks"[146] to which number was added a bailiff, appointed by the commissioners of election.[147] Under prior law, each precinct in the State of Mississippi was in the charge of six paid poll workers on election day.

When the 1986 Code was enacted, Mississippi had in excess of 2,000 precincts, resulting in the employment of well over 12,000 poll workers statewide for each election.

The 1986 Election Code ends this practice and requires a minimum of three poll workers at each precinct.[148] The poll workers are called "managers", one of whom is designated by

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[143] *See* B. Martin, *et al.*, *A Study of Independent Candidates and Black Party Nominees in Mississippi from 1982 to 1986* at 2 (Oct. 31, 1986) *contained in* IV TASK FORCE DOCUMENT, *supra* note 14, at 2 (study requested by United States Department of Justice).

[144] *See* MISS. CODE ANN. § 23-15-359(3), (4) (Supp.1987)(independent candidates now required to qualify no later than date candidates required to pay fee for entry into primary election).

[145] *See* MISS. CODE ANN. § 23-5-99 (1972)(if suitable, three persons not of same political party are to be appointed as managers for each election district).

[146] *See* MISS. CODE ANN. § 23-5-103 (1972)(clerks must perform election duties without attempting to guide or influence any voter in exercise of right to vote, except as expressly allowed by law).

[147] *See* MISS. CODE ANN. § 23-5-105 (1972)(bailiffs to be present during election to keep peace, to protect voting place, to prevent improper intrusion upon voting place or interference with election, to arrest all persons creating any disturbance about voting place, to enable all qualified electors who have not voted, who desire to vote, to have unobstructed access to polls for purpose of voting when others are not voting).

[148] *See* MISS. CODE ANN. § 23-15-231 (Supp. 1987)(commissioners of elections shall appoint three persons to each voting precinct, one of whom shall serve as elections bailiff).

the election commissioners as "bailiff."[149] Because Mississippi's voting precincts vary greatly in size, the Code allows the appointment of additional managers or "clerks."[150] Election commissioners may exercise their discretion in appointing up to three additional managers or clerks regardless of the size of the precinct and up to three additional clerks for each 1,000 registered voters or fraction thereof in a precinct above the first 500 registered voters.[151] The same authorization and restrictions apply to the appointment of managers and clerks by county executive committees for party primaries.[152]

The 1986 Election Code requires for the first time that managers and clerks attend formal training sessions before becoming eligible to work at a polling place.[153] Similarly, election commissioners and county executive committee members must now be schooled in the proper functions to be performed by each.[154] Like the parallel requirements for the training of poll workers in the operation of voting devices, this new provision should enhance the prospects for efficiency on election day and decrease the likelihood of impropriety.[155]

3. Campaign Literature Disclaimers

The 1986 Election Code incorporates earlier state law provi-

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[149] *Id.*

[150] *See* MISS. CODE ANN. § 23-15-235 (Supp. 1987)(election commissioners in their discretion may appoint three additional clerks for each 1000 registered voters above first 500).

[151] *Id.* The appointment restrictions provided for in § 23-15-235 do not apply to elections conducted by paper ballot until January 1, 1989. *Id.*

[152] *See* MISS. CODE ANN. § 23-15-265 (Supp. 1987)(number of managers and clerks appointed by county executive committee shall be same number as commissioners of election are allowed to appoint under MISS. CODE ANN. §§ 23-15-231, 23-15-235 (Supp. 1987)).

[153] *See* MISS. CODE ANN. § 23-15-239 (Supp. 1987)(election commissioners of each county shall sponsor and conduct training sessions to instruct managers and clerks as to their duties in administration of election as well as operation of polling place).

[154] *See* MISS. CODE ANN. § 23-15-211 (Supp. 1987)(Secretary of State shall sponsor and conduct annually election training seminar to instruct election commissioners as well as county executive committee representatives concerning their duties in administration of elections).

[155] *See* Welch v. McKenzie, 592 F. Supp. 1549, 1557 (S.D. Miss. 1984)(improper practices in local election attributed, in part, to failure to educate poll workers).

sions requiring the identification of a person or other entity sponsoring the publication of campaign literature. The Code provides that any printed matter "having reference to any election" shall reflect the name and address of the author, printer and publisher and that the failure to do so shall be a misdemeanor.[156]

This prohibition on anonymous political advertising is contrary to first amendment protections. The United States Court of Appeals for the Tenth Circuit has very recently construed a similar statute of the State of Oklahoma.[157] In *Wilson v. Stocker*, the Tenth Circuit affirmed the lower court's ruling striking down the statute as overbroad "because it infringes upon the right to speak and write freely about political issues by criminalizing anonymous political speech."[158]

The court in *Wilson* relied upon *Talley v. California*,[159] where the United States Supreme Court had struck down a similar statute.[160]

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[156] *See* MISS. CODE ANN. § 23-15-899 (Supp. 1987)(printed matter having reference to any election or candidate that has not been approved by candidate or his campaign manager shall bear name and address of author, printer and publisher).

[157] Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987). The relevant part of the Oklahoma statute under consideration states:

> It shall be unlawful for any person . . . to broadcast, write, print, post, or distribute . . . a statement, circular, poster, or advertisement which is designed to influence the voters on the nomination or election of a candidate . . . unless there appears in a conspicuous place . . . the name and the address of the person . . . Persons violating this act shall be guilty of a misdemeanor.

Id. at 947.

[158] *Id.* at 948. Other cases have also indicated that mandatory disclosure requirements have the effect of chilling first amendment practices. *See, e.g.*, N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 462 (1958)(compelled disclosure of affiliation with groups engaged in advocacy may constitute effective restraints upon freedom of association); Rosen v. Port of Portland, 691 F.2d 1243, 1250 (9th Cir. 1981)(requirement that those exercising free speech rights identify themselves has chilling effect on free speech). *But see* Buckley v. Valeo, 424 U.S. 1, 67 (1976)(government interest in deterring corruption is sufficient to justify intrusion on first amendment rights resulting from financial disclosure of political contributors).

[159] Talley v. California, 362 U.S. 60 (1960).

[160] The Los Angeles City Ordinance construed by the Court in *Talley*, read, in part, as follows:

> No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:
>
> (a) The person who printed, wrote, compiled or manufactured the same.

In the light of the clear statement of the Supreme Court in *Talley* and the recent recognition of the import of *Talley* by the Tenth Circuit, Section 23-15-899 appears to be clearly invalid. The Legislature should remove this restrictive provision from the Code. Its retention is likely to have a chilling effect on the legitimate political activities of many who are unaware of its facial invalidity.

4. Presidential Electors

As might have been expected, recodification of the entire body of Mississippi's election laws has led to some incongruous results. An example of the confusion created appears in Article 21, styled "Presidential and Vice-Presidential Electors."[161]

The first section of that article provides for the selection of "electors" at a state convention of a political party for placement on a primary election ballot.[162] Section 23-15-771 provides that a party's state convention shall designate a slate of electors who will support the party's presidential and vice presidential candidates, and that the names of those electors are to be placed "upon the primary election ballot to be held as herein provided."[163]

Section 23-15-771 was taken directly from a similar provision in the 1972 Code.[164] Unfortunately, however, the 1972 Code section immediately following the predecessor to Section 23-15-771 was not incorporated into the new Election Code.[165] The absent provision described the "primary election" to which section

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(b) The person who caused the same to be distributed . . . .
Id. at 60-61.

[161] *See* MISS. CODE ANN. §§ 23-15-781 to -791 (Supp. 1987)(provides for selection of presidential and vice-presidential electors for place on primary and general election ballots).

[162] *See* MISS. CODE ANN. § 23-15-771 (Supp. 1987)(requires electors to express clear design and purpose to support candidates of national political party with which said party of state has affiliations).

[163] *Id.*

[164] *See* MISS. CODE ANN. § 23-1-17 (1972)(provides for selection of electors to be placed on primary elections ballot).

[165] *See* MISS. CODE ANN. § 23-1-19 (1972)(group of electors receiving most votes at primary election shall be placed upon ballot in general election as electors of said political party in state).

23-15-771 is, presumably, intended to refer, as a primary to be held in September of each presidential election year.[166]

Further, Section 23-15-771 appears to be inconsistent with Article 37, creating Mississippi's presidential preference primary.[167] That portion of the law provides that the Secretary of State "shall place the *name of a candidate* upon the presidential preference primary ballot when [he] shall have determined that such a candidate is generally recognized . . . as a candidate . . . ."[168] Because Article 37 is the only provision in the new Election Code for a presidential primary and because its provisions are inconsistent with the old procedure incorporated into Section 23-15-771, the only reasonable conclusion is that the latter section is of no effect. It clearly should be amended to provide simply for the selection of electors for placement upon the *general* election ballot.[169]

III. Conclusion

Conceived and initiated by a forward looking state official, Secretary of State Dick Molpus, the work of the Election Law Reform Task Force of 1984 represented a unique, bi-racial effort to address and resolve problems inherent in a system plagued by generations of disenfranchisement, abuse and neglect. The work product of the Task Force, while not a reflection of consensus on every point, is further evidence of a new spirit of community and progress that has begun to pervade Mississippi.

The Election Code of 1986 is clearly not as encompassing as the proposal of the Task Force. The Election Code's significance, however, is in its recodification into a single work of the vast

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[166] *Id.*

[167] *See* Miss. Code Ann. §§ 23-15-1081 to -1097 (Supp. 1987)(provides for presidential preference primary to be held on second Tuesday of March in presidential election years).

[168] *See* Miss. Code Ann. § 23-15-1089 (Supp. 1987)(emphasis added)(requires Secretary of State to publish list of candidates he intends to place on ballot on or before December 15 preceding primary election).

[169] 1987 Miss. Laws, ch. 499. The Legislature did not include the suggested correction in its 1987 technical corrections to the Election Code. *Id.* The Office of the Secretary of State intends to suggest changes designed to remedy the problem identified herein during the 1988 Legislative session. Telephone interview with Phillip C. Carter, Assistant Secretary of State of the State of Mississippi (March 3, 1987).

majority of Mississippi's election laws and its incorporation of several of the most important recommendations of the Task Force, viz., expanded access to the absentee ballot, universal voting machine requirements and a common qualifying date. Taken together, these changes enhance voter participation while ensuring the fairness and integrity of the election process. These criteria ought always to guide the creation of new election laws.

CIVIL RICO AND INTELLECTUAL PROPERTY AFTER *SEDIMA*

Emmette F. Hale, III[1]

I. Introduction

> The scope of the civil RICO statute is breathtaking. An allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering charge. It may be unfortunate for federal courts to be burdened by this kind of case, but it is not for [the courts] to question policies decided by Congress and upheld by the Supreme Court. The broad language of the statute and the *Sedima* decision provide us with clear guidance.[2]

During the final days of passage of the Organized Crime Control Act of 1970 (the Act),[3] the House of Representatives quietly added a private civil provision to Title IX, the Racketeer Influenced and Corrupt Organizations provisions (RICO).[4] This

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[1] B.S., 1973, J.D., 1981, University of Mississippi; LL.M., 1985, George Washington University.

I owe an unpayable debt of gratitude to my colleague and bridge partner, Professor Mary Carolyn Ellis Staton.

[2] R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985)(Wisdom, J.).

[3] Pub. L. No. 91-452, 84 Stat. 922 (1970).

[4] 18 U.S.C. §§ 1961-1968 (1982).

Many states have passed "little RICO" statutes modeled on the federal RICO Act. Although these statutes vary in scope, some provide even greater private remedies than those in the federal RICO statute. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2301 (1978 & Supp. 1984-85)(treble damages); Cal. Penal Code § 186 (West Supp. 1985)(no private cause of action); Colo. Rev. Stat. § 18-17-101 (Supp. 1984)(treble damages; injunctive relief); Conn. Gen. Stat. Ann. § 53-393 (West Supp. 1984)(no private right of action); Fla. Stat. Ann. § 895.01 (West Supp. 1983)(treble and punitive damages; injunctive relief); Ga. Code Ann. § 16-14-1 (1984)(treble and punitive damages; injunctive relief); Hawaii Rev. Stat. § 842-1 (1972)(actual damages); Idaho Code § 18-7801 (Supp. 1984); Ill. Rev. Stat. ch. 56-½, § 1651 (Smith-Hurd Supp. 1984-85)(limited to narcotics; treble damages); Ind. Code Ann. §§ 35-45-1, 344-430.5-1 (Burns Supp. 1985)(treble and punitive damages; injunctive relief); La. Rev. Stat. Ann. § 15:1351 (West Supp. 1985)(limited to narcotics; treble damages); Miss. Code Ann. § 97-43-1 (Supp. 1984)(treble and puni-

civil remedy, better known as "civil RICO," which authorizes treble damages, costs, and attorney's fees for certain fraudulent conduct,[5] lay unnoticed for a decade until the Act's chief author, Professor Robert Blakey, revealed its scope in a 1980 law review article[6] and awakened the proverbial "sleeping giant." Even though RICO was aimed primarily at the infiltration of legitimate businesses by organized crime,[7] it soon achieved notoriety as a potential tool against "legitimate businesses."[8] In 1985 in *Sedima* and *Haroco*,[9] the Supreme Court granted civil RICO full status as a federal remedial tool against so-called "ordinary garden variety" fraud.[10]

The recent acknowledgement of the breadth of civil RICO

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tive damages); NEV. REV. STAT. § 207.350 (1983)(treble damages); N.J. STAT. ANN. § 2C:41-1 (West Supp. 1982)(treble damages); N.M. STAT. ANN. § 30-42-1 (Michie Supp. 1980)(treble damages); N.D. CENT. CODE] 12.]1-06.1 (Smith Supp. 1983)(punitive damages); OHIO REV. CODE ANN. §§ 2923.31- .36 (Baldwin 1985)(treble damages, injunctive relief, attorneys fees, costs); OR. REV. STAT. § 166.715 (1981)(treble damages; injunctive relief); 18 PA. CONS. STAT. ANN. § 911 (Purdon 1983)(no private right of action); P.R. LAWS ANN. tit. 25, § 971 (1979 & Supp. 1986)(no private right of action); R.I. GEN. LAWS § 7-15-1 (Michie Supp. 1983)(treble damages); UTAH CODE ANN. § 76-10-1601 (Smith Supp. 1983)(treble and punitive damages); WASH. REV. CODE ANN. §§ 9A.82.001-904 (Supp. 1985)(treble damages); WIS. STAT. ANN. § 946.80 (West Supp. 1984-85)(double and punitive damages).

[5] 18 U.S.C. § 1964. The availability of private injunctive relief remains a disputed issue in the federal courts. *See infra* notes 152-161 and accompanying text.

For an exhaustive pre-*Sedima* bibliography on civil RICO, see Milner, *A Civil Rico Bibliography*, 21 CAL. W.L. REV. 409 (1985). *See also* GUIDE TO RICO (BNA) 135-43 (J. Fricano, ed. 1986) [hereinafter cited as GUIDE].

[6] Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980). Professor Blakey was Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures, 1969-70. *Id.* at 1009 n.*.

[7] *See* S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969).

[8] *See, e.g.*, Taylor v. Bear Stearnes & Co., 572 F. Supp., 667 (N.D. Ga. 1983)(defendant stockholder and brokerage firm); Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667 (W.D. Mich. 1983)(same); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231 (S.D.N.Y. 1983)(same); Hokama v. E.F. Hutton & Co., 566 F. Supp. 636 (C.D. Cal. 1983)(defendant limited partnership, general partner, and others); Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983)(defendant insurance company and life underwriters).

[9] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); American Nat'l Bank and Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606 (1985).

[10] "Ordinary garden variety" fraud encompasses all common-law fraud. *Cf.* Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20 (N.D. Ill. 1982)(stockbroker misrepresented state of client's accounts).

by the Supreme Court should not have come as any surprise. In its two RICO opinions prior to *Sedima*,[11] the Supreme Court announced the statutory construction rule to be followed in RICO cases: first, the language of the statute itself is examined; second, if the language of the statute is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary," the statutory language "must ordinarily be regarded as conclusive."[12] The Court found the language of RICO to be broad, not ambiguous; moreover, the Court in each case found the statutory language to be conclusive since there was no contrary Congressional intent. The Court was particularly persuaded by the unusual provision in RICO that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose."[13] In short, the Court left to Congress the principal task of restricting or restructuring the scope of RICO.

Although the Court resolved two issues in *Sedima* and *Haroco*,[14] the federal courts still disagree on many more issues.[15] At least three factors have created this air of uncertainty in civil RICO: first, the breadth of the statute itself; second, the almost nonexistent legislative history on the private treble damages remedy; and third, the analogy of the treble damages remedy of civil RICO to the private damages remedy of the antitrust laws. Consequently, the courts differ from circuit to circuit,[16] from panel to panel within circuits,[17] and even from district court to district court within a district.[18] Despite these unanswered ques-

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[11] Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576 (1981).

[12] *Russello*, 464 U.S. at 20 (citing U.S. v. Turkette, 452 U.S. 576, 580 (1981)).

[13] Pub. L. No. 91-452, § 904(a), 84 Stat. 922 (1970). The *Russello* Court noted that the liberal construction directive in RICO is unique among the substantive federal criminal statutes. *Russello*, 464 U.S. at 27.

[14] The Court in *Sedima* repudiated the prior conviction and "racketeering injury" requirements of the Second Circuit. *See infra* notes 85-87 and accompanying text.

[15] *See* Section II(F) for a summary of current unresolved issues in civil RICO.

[16] *See infra* notes 143-145 and accompanying text.

[17] *Compare* Ray v. Karris, 780 F.2d 636 (7th Cir. 1985)(defrauded minority shareholders are proper RICO plaintiffs) *with* Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985)(taxpayers are not proper plaintiffs).

[18] *Compare* Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc., 615 F. Supp. 828 (N.D. Ill. 1985)(two kickbacks failed to satisfy "pattern" requirement) *with* Graham v. Slaughter, 624 F. Supp. 222 (E.D. Ill. 1985)(twenty acts of embezzlement constitute

tions in civil RICO interpretation, automatic treble damages is a powerful lure. Unless Congress changes its provisions drastically or the courts restrict its scope, civil RICO will remain a powerful tool for intellectual property owners, especially in areas where traditional intellectual property remedies do not provide complete relief.

Part II of this article attempts to unravel the web of civil RICO and to explain its structure and nature. Part III explores the use of civil RICO in the traditional federal intellectual property areas of the patent, copyright, and trademark.[19] Finally, the article concludes with the observation that although civil RICO may need "fine tuning," it can play an important role in intellectual property to provide complete relief against fraudulent conduct by even "legitimate" businesses.

II. Structure and Nature of Civil RICO—A "Treasure Hunt"[20]

A. Legislative History—"Clanging Silence"[21]

Although a detailed discussion of the legislative history of RICO is beyond the scope of this article,[22] in order to understand the issues facing the courts, the events surrounding the addition of the civil remedy provision must be reviewed. The federal government has been concerned with the evils of organized crime[23] since at least the early 1950's. In 1951, the Special

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"patterns").

[19] State common law intellectual property areas such as unfair competition and trade secret are beyond the scope of this article. The latest entrant into the federal intellectual property field, the Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 903-914 (Supp. 1984), is also not addressed.

[20] Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 652 (7th Cir. 1984)(Posner, J.).

[21] Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 492 (2d Cir. 1984).

Contrary to the statutory construction rule of the Supreme Court in the RICO cases, Part II discusses the legislative history first to provide a background of the legislation.

[22] For a detailed discussion of the legislative history of RICO see Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 249-80 (1982); Blakey & Gettings, *supra* note 6, at 1014-21.

[23] The definition of "organized crime" is difficult to state. In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that organized crime is a "society that seeks to operate outside the control of the American people

Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee) reported that organized crime had infiltrated legitimate businesses.[24] In 1960, the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) reported the infiltration of labor unions by criminals[25] and for the first time revealed the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra.[26] In 1967, the President's Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) recommended the use of new approaches to control the infiltration of legitimate businesses by

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and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate corporations." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 1 (1967) [hereinafter cited as THE CHALLENGE].

One task force on organized crime defined "organized crime" in terms of its characteristics:

> (1) [o]rganized crime is a type of conspiratorial crime, sometimes involving the hierarchial coordination of a number of persons in the planning and execution of illegal acts, or in the pursuit of a legitimate objective by unlawful means; (2) [o]rganized crime has economic gain as its primary goal, though some of the participants in the conspiracy may have achievement of power or status as their objective; (3) [o]rganized crime is not limited to patently illegal enterprises or unlawful services such as gambling, prostitution, drugs, loan sharking, or racketeering [but] also includes such sophisticated activities as laundering of illegal money through a legitimate business, land fraud, and computer manipulation; (4) [o]rganized crime employs predatory tactics such as intimidation, violence, and corruption, and it appeals to greed to accomplish its objectives and preserve its gains; (5) [b]y experience, custom and practice, organized crime's conspiratorial groups are usually very quick and effective in controlling and disciplining their members, associates, and victims; (6) [o]rganized crime is not synonymous with the Mafia or La Cosa Nostra, the most experienced, diversified, and possibly best disciplined of the conspiratorial groups; and (7) [o]rganized crime does not include terrorists dedicated to political change, although organized criminals and terrorists have some characteristics in common including types of crimes committed and strict organization structures.

REPORT OF THE TASK FORCE ON ORGANIZED CRIME: ORGANIZED CRIME 7-8 (1976); *see also* A. BEQUAI, ORGANIZED CRIME: THE FIFTH ESTATE 1-7 (1979).

[24] *See* S. REP. No. 141, 82d Cong., 1st Sess. (1951); S. REP. No. 307, 82d Cong., 1st Sess. (1951).

[25] *See generally* S. REP. No. 1784, 87th Cong., 2d Sess. (1962); S. REP. No. 621, 86th Cong., 2d Sess. (1969); S. REP. No. 1417, 85th Cong., 2d Sess. (1958).

[26] S. REP. No. 62, 89th Cong., 1st Sess., (1965).

organized crime.[27]

As a response to the report of the Katzenbach Commission, two bills modeled on the antitrust laws, S. 2048[28] and S. 2049,[29] were introduced in the Senate in 1967. Although neither bill was reported out of committee, both bills were studied by the private sector, particularly the Antitrust Section of the American Bar Association.[30] The ABA specifically recommended that the antitrust focus of the two bills be removed to avoid the judicial restrictions of antitrust such as "standing" and "antitrust injury."[31]

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[27] THE CHALLENGE, *supra* note 23, at 200-09. For example, the Commission recommended that "[g]roups should be created with the Federal and State departments of justice to develop strategies and enlist regulatory action against businesses infiltrated by organized crime [;] [p]rivate business associations should develop strategies to prevent and answer organized crime's illegal and unfair business tactics." *Id.* at 208.

[28] S. 2048, 90th Cong., 1st Sess. (1967). This bill would amend the Sherman Act to prohibit the investment or business use of unreported income:

> Every person who (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise engaged in or affecting trade or commerce among the several states, with foreign nations, or within any place subject to the provisions of section 3, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $50,000, or imprisoned for not more than one year or both.

Id.

[29] S. 2049, 90th Cong., 1st Sess. (1967). S. 2049 prohibited: (1) the acquisition of an interest in a business affecting interstate commerce with income derived from enumerated criminal activities, and (2) the agent of a corporation from authorizing the corporation to engage in any of the enumerated criminal activities. *Id.* at §§ 2(1), 3. In addition to the government, third parties could seek injunctions to restrain violations of S. 2049, *id.* at § 5(b). Victims could also recover for treble damage costs and attorneys' fees, *id.* at § 5(a).

Congressman Poff introduced companion bills to S. 2048 and S. 2049 in the House. H.R. 11766 and H.R. 11268, 90th Cong., 1st Sess., 113 CONG. REC. 17976 (1967).

[30] *See Organized Crime Control: Hearings on S. 30 Before the Subcomm. No. 5, House Comm. on the Judiciary*, 91st Cong., 2d Sess. 149 (1970)(statement of Edward L. Wright, President Elect of ABA) [hereinafter cited as *House Hearings on S. 30*].

[31] The ABA Report stated:

> The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilization in this fight. It therefore supports and endorses the principles and objectives of both S. 2048 and S. 2049, and similar legislation.
>
> However, it prefers the approach of S. 2049. By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided

In January, 1969, Senator John L. McClellan of Arkansas introduced S. 30,[32] which, although it did not originally contain RICO-type provisions, was drafted in response to many of the recommendations of the Katzenbach Commission.[33] In March, 1969, Senator Hruska introduced S. 1623,[34] a redraft of S. 2048 and S. 2049,[35] which also included the civil remedies of private equitable relief and treble damages.[36] After hearings on S. 30 and S. 1623, Senators McClellan and Hruska introduced S. 1861,[37] which combined the provisions of S. 30 and S. 1623, and

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. . .

Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent — appropriate in a purely antitrust context — setting strict requirements on questions such as "standing to sue" and "proximate cause".

Conversely, the placing of this legislation in the body of the antitrust laws could have an undesirable and inappropriate impact on the administration of the antitrust laws in their normal context. Thus, faced with litigation between private citizens and members of the organized criminal hierarchy, there may well be a natural inclination to weight the balance heavily in favor of the private citizen. Such an imbalance, while defensible in this context, is inappropriate in the normal antitrust litigation context.

115 CONG. REC. 6994-95 (1969).

For a discussion of antitrust standing, see *infra* notes 118-123 and accompanying text.

[32] Organized Crime Control Act, S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969). Senator McClellan was also one of the chief sponsors of the 1976 revision of the copyright statutes and the author of the Senate Report on the 1976 revision of the copyright statutes. S. REP. No. 94-473, 94th Cong., 1st Sess. (1975).

[33] The Organized Crime Control Act was a broad bill introducing reforms in such areas as grand juries, immunity, contempt, false statements, depositions, and sentencing for dangerous special offenders. *See* S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 39906-07 (1969).

[34] The Criminal Activities Profit Act, S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969).

[35] 115 CONG. REC. 6993 (1969)(remarks of Sen. Hruska when introducing S. 1623).

[36] S. 1623 §§ 3(C), 4(a).

[37] The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-9571 (1960). S. 1861 was "in part a result of testimony developed in four days of hearings on S. 30." 115 CONG. REC. 9567 (1969)(remarks of Sen. McClellan upon introduction of S. 1861). Hearings on S. 30 were broadened to include hearings on other bills. *See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122 and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 268 (1969)[hereinafter cited as *Senate Hearings on S. 30*].

introduced for the first time the terms "racketeering activities" and "pattern of racketeering activity." However, the civil remedies were limited to injunctions by the United States.[38] After review by the Department of Justice and others,[39] S. 1861 was incorporated, with certain changes, into S. 30 as Title IX.[40] Senator McClellan reported S. 30 out of the Senate Judiciary Committee on December 18, 1969,[41] and the Senate passed it overwhelmingly on January 23, 1970.[42]

The private treble damages provision originally in S. 1861 was proposed in the House of Representatives during consideration of S. 30.[43] During hearings before the House Judiciary Committee, Representative Steiger proposed a private treble damages provision similar to the antitrust treble damage remedy to provide redress to the victims of organized crime.[44] The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act" to strengthen the enforcement of the Act through "private attorneys general."[45]

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[38] S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9569 (1969). S. 1861 also added to the provisions of S. 1623 by providing civil investigative demands, criminal forfeitures and a congressional mandate for liberal construction. *See id.*, 115 CONG. REC. 9569-71 (1969).

The legislative history is silent concerning why S. 1861 did not provide a private cause of action. Professor Blakey states that the private civil section was dropped "in an effort to streamline [the bill] and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies." Blakey & Gettings, *supra* note 6, at 107-18.

[39] *Senate Hearings on S. 30*, *supra* note 37, at 268, 405-06, 475-77.

[40] While immunity was provided in title II of S. 30, it was deleted from title IX. Organized Crime Cntrol Act of 1970, Pub. L. No. 91-452, 84 Stat. 926-28 (codified at 18 U.S.C. §§ 6001-6005 (1982)). The definition of "racketeering activity" was clarified and enlarged to include most types of organized crime conduct. *House Hearings on S. 30*, *supra* note 30, at 50-51. Likewise, the definition of "pattern of racketeering activity" was narrowed by requiring at least two acts, one of which must have been committed after the effective date of the law. *Id.* at 52. Finally, the bill required that the investor must participate as a principal in the racketeering activity and minimal investment was permitted without imposing additional penalties. *Id.* at 53-54.

[41] S. REP. No. 617, 91st Cong., 1st Sess. 215 (1960)(Senators Hart and Kennedy's objections concerning the bill's scope being beyond criminal activity).

[42] S. 30 passed the Senate by a vote of 73 to 1. 116 CONG. REC. 972 (1970).

[43] *House Hearing on S. 30*, *supra* note 30, at 520, 548. The private cause of action added by the House was taken from one of the parallel House bills to S. 30, H.R. 19586, 91st Cong., 2d Sess., 116 CONG. REC. 35242 (1970).

[44] *House Hearings on S. 30*, *supra* note 30, at 520 (proposal of Rep. Steiger).

[45] *Id.* at 548 (proposal of American Bar Association). Representative Steiger's pro-

The treble damages provision was approved by the Committee over the dissent of three members who charged that it would be used for malicious harassment of business competitors.[46] After several unsuccessful attempts to amend, *inter alia*, the civil provisions on the floor,[47] the House passed S. 30, as amended, by a vote of 431 to 26.[48]

Although the private treble damage provision had been added by the House, Senators McClellan and Hruska regarded the House amendments as minor and suggested that a conference was not necessary to resolve the differences.[49] By a voice vote, the Senate accepted the House amendments.[50] President Richard M. Nixon signed the legislation on October 15, 1970.[51]

The stated purpose of the Organized Crime Control Act of 1970 is "to seek the eradication of organized crime in the United

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posal, like those of the rejected Senate bills, provided explicitly for private injunctive relief. *Id.* at 521. The legislative history does not reveal why the subcommittee rejected private injunctive relief and chose instead to create only a private action for treble damages. The statutory language adopted was taken from H.R. 19586, 91st Cong., 2d Sess. 56 (1970), one of the House bills paralleling S. 30.

[46] *House Hearings on S. 30*, *supra* note 30, at 187 (dissenting views of Reps. Ryan, Conyers and Mikva).

[47] Representative Steiger offered an amendment to provide private injunctive relief which was withdrawn before the House could vote on it. 116 CONG. REC. 35346 (1969). Professor Blakey maintains that "[w]ithdrawal, rather than defeat, was desirable to avoid creating an unfavorable legislative history on the ideas contained in the amendment . . . ." Blakey & Gettings, *supra* note 6, at 1020, n.67. In the next Congressional term, the same amendment was proposed in the Senate as S. 16, 92 Cong., 1st Sess. (1971) to assure private injunction actions; in addition, a specific statute of limitations was proposed. *See generally Victims of Crime: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1972). Although the Senate Judiciary Committe reported favorably on S. 16, S. Rep. No. 1070, 92d Cong., 2d Sess. (1972), and it was passed unanimously by the Senate, 118 CONG. REC. 29379 (1972), the House took no action on it. The same provision was introduced and passed by the Senate. 119 CONG. REC. 10319 (1973). Likewise, the bill died in the House committee. 119 CONG. REC. 10592 (1973).

Two other amendments were defeated during the floor debate on amendment 30. An amendment by Congressman Mikva establishing penalties for treble damage actions was defeated, as well as an amendment by Congressman Biaggi to outlaw being a member of "organized crime." 116 CONG. REC. 35342, 35343 (1970).

[48] 116 CONG. REC. 35363 (1970).

[49] 116 CONG. REC. 36293 (1970). The Senate received S. 30 from the House on October 12, 1970, which was only 29 working days before the end of the session and two days before the election recess. *See* 116 CONG. REC. 36280-37264 (1970).

[50] 116 CONG. REC. 36296 (1970).

[51] 116 CONG. REC. 27364 (1970).

States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[52] More specifically, RICO was designed to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce" through the proscription of certain conduct associated with infiltration.[53] In short, the legislative history of RICO focuses on criminal sanctions to attack organized crime when it has infiltrated legitimate businesses. More importantly, the legislative history reverberates with a "clanging silence" concerning the private civil damages provision which was quietly added by the House and left intact by the Senate.

B. Elements of Civil RICO Offense[54]

The civil RICO statute, 18 U.S.C. § 1964, provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 may sue . . . and shall recover [treble damages] and [costs], including a reasonable attorney's fee."[55] In turn, 18 U.S.C. § 1962 prohibits any "person" from (1) using income derived from a "pattern of racketeering activity" to invest in an "enterprise"; (2) from acquiring or maintaining an interest in an "enterprise" through a "pattern of racketeering activity"; (3) from conducting the affairs of an "enterprise" through a "pattern of racketeering activity"; or (4) from conspiring to commit any of these prohibitions.[56] The terms "person," "enterprise," "racketeering activity," and "pattern of racketeering activity" are then defined in section 1961.

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[52] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

[53] S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969).

[54] Although RICO is primarily a criminal law, the courts have never created a criminal/civil dichotomy in the development of RICO jurisprudence. Thus, with the obvious exception of standard of proof, case law under criminal RICO is equally applicable to civil RICO actions. Although this article follows this judicial preference and will not distinguish cases on the type of action brought, the style of the case should provide some clue.

[55] 18 U.S.C. § 1964 (1982).

[56] 18 U.S.C. § 1962 (1982); *see infra* notes 57-116 and accompanying text.

1. "Person"

Section 1961 defines "person" broadly to include "any individual or entity capable of holding a legal or beneficial interest in property . . ."[57] Due to the use of the word "include," it is apparent that Congress meant for the definition of "person" to be illustrative and not limiting.[58] Thus, the Seventh Circuit concluded that a state governmental unit is a "person" and can be sued under civil RICO.[59]

2. "Enterprise"

Section 1961 defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[60] Again, the use of the word "include" implies illustration and not limitation.[61] The enterprise must be one "engaged in, or the activities of which affect," interstate commerce.[62] Nevertheless, as with other Commerce Clause statutes, the nexus to interstate commerce is "minimal."[63]

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[57] 18 U.S.C. § 96(3) (1982).

[58] *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 312 n.9 (1978)(foreign nation is "person" for Clayton Act); Highway & City Freight Drivers v. Gordon Transp., Inc., 576 F.2d 1285, 1289 (8th Cir.)(labor union is "person" for Bankruptcy Act), *cert. denied*, 439 U.S. 1002 (1978); N. SINGER, 24 STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. 1984)("includes" is term of enlargement).

The Copyright Act of 1976 specifically states that "[t]he terms 'including', and 'such as' are illustrative and not limitative." 17 U.S.C. § 101 (1982).

[59] Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 316-17 (7th Cir. 1985). Members of organized crime as well as white-collar criminals come within the definition of "persons" in RICO. *See, e.g.*, United States v. Gambino, 566 F.2d 414, 416-17 (2d Cir. 1977)(organized crime figure), *cert. denied*, 435 U.S. 952 (1978); United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976)(Governor of Maryland), *aff'd*, 591 F.2d 1347, 1370 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653, 654 (4th Cir. 1979)(en banc), *cert. denied*, 445 U.S. 959 (1980).

[60] 18 U.S.C. § 1961(4) (1982).

[61] *See, e.g.*, United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979)(corporation can be RICO "enterprise")(*citing* Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99-100 (1941)), *cert. denied*, 445 U.S. 927 (1980).

[62] 18 U.S.C. § 1962 (1982).

[63] *See* United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (RICO requires minimal "enterprise" nexus), *cert. denied*, 445 U.S. 946 (1980). There is no requirement that the enterprise, *see infra* notes 60-77 and accompanying text, must affect interstate commerce; the predicate acts, *see infra* notes 78-102 and accompanying text, may provide

The broad statutory definition of enterprise, which is the central focus of a RICO violation, raises several questions. The courts agree that legitimate businesses[64] as well as illegitimate businesses[65] are within the definition of enterprise. In addition, labor unions, government agencies, and foreign businesses all qualify as enterprises under RICO.[66] Furthermore, under the specific language of section 1961, an enterprise is not limited to a legal entity but encompasses associations in fact.

However, the courts disagree on the requisite structure for an association in fact. In its first look at RICO, the Supreme Court in *United States v. Turkette*[67] held that illegitimate as well as legitimate associations can form an enterprise.[68] The

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the nexus with interstate commerce. R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1353 (5th Cir. 1985); Bunker Ramo Corp. v. United Business Forms, 713 F.2d 1272, 1289 (7th Cir. 1983); United States v. Bagnariol, 665 F.2d 877, 893 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); United States v. Barton, 647 F.2d 224, 233-34 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

The Sherman Act has been construed by the Supreme Court to be an "affecting commerce" statute which reaches substantially as far as the Commerce Clause of the Constitution allows. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980)(financing residential property meets effect on commerce requirement); Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 744 (1976)(indirect effect is sufficient); Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975)(title examination is "commerce"). In contrast, the Clayton Act, except for section 7 (the anti-merger section), 15 U.S.C. § 18 (1982), is an "in commerce" statute. *See* United States v. American Bldg. Maintenance Industries, 422 U.S. 271, 278 (1975)("in commerce" not coextensive with reach of commerce clause); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199 (1974)(same).

[64] *See supra* note 8.

[65] *See* United States v. Turkette, 452 U.S. 576, 584-87 (1981)(group of individuals associated solely for criminal purposes).

[66] *See, e.g.*, United States v. Boffa, 688 F.2d 919, 938 (3d Cir. 1982)(labor union is RICO enterprise), *cert. denied*, 460 U.S. 1022 (1983); United States v. Thompson, 685 F.2d 993, 1000 (6th Cir.)(government agency is RICO enterprise), *cert. denied*, 459 U.S. 1072 (1982); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974)(foreign business), *cert. denied*, 429 U.S. 820 (1976).

[67] 452 U.S. 576 (1981).

[68] *Id.* at 580. Turkette and twelve (12) other defendants were indicted for conspiracy to conduct and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering in violation of 18 U.S.C. § 1962(d) (1982). *Id.* at 578-79. The enterprise was defined in the indictment as " 'a group of individuals *associated in fact* for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings . . . .' " *Id.* at

Court established a three-prong test to establish an "enterprise": first, there must be evidence of "an ongoing organization, formal or informal"; second, there must be evidence "that the various associates function as a continuing unit"; and third, there must be evidence that the "enterprise" is "separate and apart from the pattern of activity in which it engages."[69] However, the Court recognized that while a "pattern of racketeering" and an "enterprise" are separate statutory elements, "the proof used to establish these separate elements may in particular cases coalesce."[70]

In light of the potential for merger of proof in particular cases, the courts of appeals have differed on the interpretation of *Turkette*. Specifically, the courts have differed on whether an association in fact can be a group associated only to commit the predicate acts.[71] In rejecting this proposition, the Eighth Circuit in *United States v. Bledsoe*[72] reasoned that unless the proof of an enterprise requires proof of "some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering," the enterprise element would disappear.[73] The court formulated its own three-pronged test based on *Turkette*: first, the enterprise must have a common or shared purpose that animates those associated with it; second, the enterprise must function as a continuing unit; and third, the enterprise must have an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.[74] Although the Third and Fourth Circuits have en-

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579. Turkette was convicted and sentenced to a 20-year concurrent term and fined $20,000. *Id.* On appeal, in reversing the RICO conviction, the First Circuit agreed with Turkette that the sole intent of Congress in enacting RICO was to protect legitimate business enterprises from participation in an association which only engages in illegal conduct and which has not infiltrated or attempted to infiltrate a legitimate business or enterprise. *Id.* at 579-80.

[69] *Id.* at 583.

[70] *Id.*

[71] See *infra* notes 78-102 and accompanying text for discussion of "racketeering activities" or predicate acts.

[72] 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982).

[73] *Bledsoe*, 674 F.2d at 664.

[74] *Id.* at 665. The Eighth Circuit appeared to be influenced by the definition of "enterprise" in the Fair Labor Standards Act, 29 U.S.C. § 201 (1982), which the Supreme Court had construed in Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973), to be

dorsed the separate existence requirement of the Eighth Circuit,[75] the Second and Eleventh Circuits have interpreted the "formal or informal" language of *Turkette* to preclude an ascertainable structure requirement.[76] However, the courts of appeals do agree that "continuity is a necessary, if not sufficient, condition" for an enterprise.[77]

3. *"Racketeering Activity"—Predicate Acts*

Section 1961 defines "racketeering activity" in terms of a "laundry list" of specific state and federal criminal acts. These "predicate acts" can be categorized thus: (1) violent crimes—murder, kidnapping, arson, robbery, extortion, and obstruction of justice; (2) illicit goods and services crimes—gambling, pornography, narcotics, counterfeiting, theft and trafficking in restricted goods; (3) breach of fiduciary duty crimes in a labor contest—restrictions on payments and loans to labor organizations; and (4) commercial fraud crimes—embezzlement, securities fraud, mail fraud and wire fraud.[78] The federal predicate acts are defined in terms of acts

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composed of three elements: related activities, unified operation or common control, and common business purpose. *Bledsoe*, 674 F.2d at 664 n.10.

[75] *See* United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985)(evidence showed ongoing organization); United States v. Riccobene, 709 F.2d 214, 216 (3d Cir.)(same), *cert. denied sub nom.* Ciancaglini v. United States, 464 U.S. 849 (1983).

[76] *See* United States v. Weinstein, 762 F.2d 1522, 1537 (11th Cir.), *cert. denied*, 106 S. Ct. 1519 (1985)(ascertainable structure not essential element of "enterprise"); United States v. Bagaric, 706 F.2d 42, 55 (2d Cir.)(enterprise in sum of predicate racketeering acts), *cert. denied sub nom.* Logarusic v. United States, 464 U.S. 840 (1983).

[77] Lipin Enterprises, Inc. v. Lee, 625 F. Supp. 1098, 1100 (N.D. Ill. 1985)(footnote omitted), *aff'd*, 803 F.2d 322 (7th Cir. 1986).

[78] 18 U.S.C. § 1961(1) (Supp. 1987). Specifically, "racketeering activity" means:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment if the act indictable under section 659 is felonious), section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section

which are *indictable* under specific federal criminal statutes. The state predicate acts are defined as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law and punishable by imprisonment of more than one year . . . ."[79] In the civil RICO context, the most important predicate act are those involving commercial fraud—securities fraud, mail fraud, and wire fraud.

To reduce proliferation of civil RICO cases against legitimate businesses, the Second Circuit required prior convictions for the predicate acts in *Sedima, S.P.R.L. v. Imrex Co.*[80] The

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1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to engaging in monetary transactions in property derived from special unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c)(relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Id.

[79] *Id.* (emphasis added). In characterizing state law violations as a racketeering activity, the courts use the test that a state crime must be of "a type of activity generally known or characterized in the proscribed category." United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir. 1977).

[80] 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). This action began as a dispute between the parties to a joint venture entered into by Sedima, a Belgian corporation, and Imrex Co. to supply electronic parts to a Belgian corporation. *Id.* at 484. The buyer was to order parts through Sedima; Imrex was to acquire the parts in the United States and ship them to Europe. *Id.* Under the joint venture agreement, Sedima and Imrex were to split the net proceeds. *Id.* After Imrex had filled approximately $8,000,000 in orders placed by Sedima, Sedima concluded that Imrex was presenting inflated bills

court seized upon the phrase "by reason of a *violation* of section 1962" in section 1964 to find a prior conviction requirement.[81] The court concluded that otherwise a civil RICO plaintiff would have to prove different parts of the case under different standards of proof: the predicate acts as criminal offenses would have to be established beyond a reasonable doubt while the other components would need only to be proven by a preponderance of the evidence.[82] The court feared that different standards of proof would lead to jury confusion.[83] In addition, the court feared that any other construction would raise difficult constitutional questions since "civil remedies for offenses, criminal in nature, [would] stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law."[84]

On review, the Supreme Court could not envision the problems posed by the Second Circuit and rejected the prior conviction requirement.[85] The Court concluded that neither the language nor the legislative history of RICO supported the narrow construction by the Second Circuit; in addition, the Court concluded that the practical concerns over burden of proof and constitutional problems did not warrant the attention the lower court gave them.[86] Moreover, the Court concluded that a prior

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for payment. *Id.* Sedima filed suit in the Eastern District of New York setting out various state law claims and a RICO claim under section 1964(c) based on the predicate acts of mail and wire fraud. *Id.* The district court dismissed the RICO claim for failure to state a claim since Sedima had not alleged a "RICO-type injury." Sedima, S.P.R.L. v. Imrex Co., 574 F. Supp. 963, 965 (E.D.N.Y. 1983). A divided panel of the Second Circuit affirmed. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984).

[81] *Sedima*, 741 F.2d at 498-99.

[82] *Id.* at 501-02.

[83] *Id.*

[84] *Id.* at 500 n.49.

[85] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489-96 (1985).

[86] *Id.* The Court used the antitrust laws as an example that the mere fact that conduct can result in both criminal and civil liability does not mean that there is not a legitimate civil action. *Id.* at 492-93. In addition, the Court concluded that the stigma of the word "racketeer" leaves no greater stain than do a number of other civil proceedings." *Id.* Moreover, the Court failed to see how conviction of the predicate acts would protect against the imposition of a "racketeer" label. *Id.* Finally, the Court observed that if section 1964(c) is quasi-criminal, the solution is to provide the protections afforded in

conviction requirement would thwart the private attorney general provision in section 1964(c) which had been created to fill prosecutorial gaps through private enforcement.[87] The inclusion of mail and wire fraud as predicate acts has expanded civil RICO beyond the original Congressional concern over the infiltration of legitimate businesses by organized crime.[88] A violation of the mail fraud statute is established by proof of two elements: a scheme or artifice to defraud, *or* the obtaining of money or property by means of false or fraudulent pretenses, representations, or promises; and the use of the mails, either interstate or intrastate, for purposes of furthering or executing such a scheme or artifice.[89] With the exception that the use of the wires must be interstate in nature, the elements of a wire fraud violation are

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criminal proceedings and "not to insure that they were previuosly afforded by requiring prior convictions." *Id.* (footnote omitted).

For the Court's discussion of standard of proof, see *infra* notes 178-83 and accompanying text.

[87] *Sedima*, 473 U.S. at 493-94. Prior to *Sedima*, the Supreme Court had sanctioned private enforcement of the antitrust laws under section 4 of the Clayton Act, the antitrust section analogous to civil RICO. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979)("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"); Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977)(Court's "longstanding policy of encouraging vigorous private enforcement of antitrust laws"); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.' "); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 126-31 (1969)("the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws"); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 ("the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws").

[88] *See* United States v. Weiss, 752 F.2d 777, 791 (2d Cir.)(Newman, J., dissenting)(federal prosecution of conduct previously thought subject only to state law), *cert. denied*, 106 S. Ct. 308 (1985).

[89] *See, e.g.*, United States v. Haimowitz, 725 F.2d 1561, 1569 (11th Cir.)(elements of mail fraud), *cert. denied*, 469 U.S. 1072 (1984); United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981)(same), *cert. denied*, 456 U.S. 949 (1982); Micro-Medical Industries, Inc. v. Hatton, 607 F. Supp. 931, 936 (D.P.R. 1985)(mail and wire fraud elements employed in civil RICO action). As in any criminal prosecution, the defendant must be associated with the scheme or artifice and must have used or "caused the use" of the mails. *See* Pereira v. United States, 347 U.S. 1, 8-9 (1954)(where one acts with knowledge that mail will be used, then that person causes use of mails).

the same as for mail fraud.[90] Moreover, case law construing the mail fraud statute is equally applicable to the wire fraud statute.[91]

Although Congress has not seen fit to define fraud, the courts have concluded that Congress intended that the mail and wire fraud statute prohibit "conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' "[92] In response to this broad Congressional intent, the courts have been very liberal in construing the statutory elements. For example, the courts have not limited a scheme to defraud to loss of tangible things such as money or property.[93] Although there must be proof that some actual harm was contemplated by the defendant, a scheme which deprives victims of "intangible right or interests" is a scheme to defraud.[94] In the commercial context, the mail and wire fraud statutes have been invoked to prosecute conduct involving check-kiting, fiduciary duty, advertising, bid-rigging, and misrepresentation.[95]

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[90] *See* Harris Trust & Sav. Bank v. Ellis, 609 F. Supp. 1118, 1122 (N.D. Ill. 1985)(statute requires scheme to defraud and interstate wire communication in furtherance of scheme), *aff'd*, 810 F.2d 700 (7th Cir. 1987).

[91] United States v. Lemire, 720 F.2d 1327, 1334-35 n.6 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *see also* United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982)(wire fraud statute meant to receive similar interpretation to mail fraud statute), *cert. denied*, 459 U.S. 1105 (1983); United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976)(wire fraud statute patterned on mail fraud statute and two are in *pari materia*).

[92] United States v. Serlin, 538 F.2d 737, 744 (7th Cir. 1976)(citations omitted).

[93] *See* United States v. Curry, 681 F.2d 406, 410-11 (5th Cir. 1982)(loss of faithful services of campaign official and loss of right to obtain financial reports).

[94] *Id.* at 411.

[95] *See* United States v. Pick, 724 F.2d 297, 300-01 (2d Cir. 1983)(check kiting), United States v. Siegel, 717 F.2d 9, 14-16 (2d Cir. 1983)(diversion of cash proceeds by corporate officers for personal use); United States v. Huff, 699 F.2d 1027, 1028-29 (10th Cir.)(even though accepted $4,000,000 in fees over eight year period, "merger broker" arranged sale of only one business), *cert. denied*, 461 U.S. 937 (1983); United States v. Rogers, 624 F.2d 1303, 1307-08 (5th Cir. 1980)(bid-rigging), *cert. denied*, 450 U.S. 917 (1981); United States v. Hanlon, 548 F.2d 1096, 1100-01 (2d Cir. 1977)(false representations concerning value of property pledged as collateral to induce loan from federally insured bank).

The mail and wire fraud statutes have also been used to prosecute non-commercial fraudulent schemes. *See, e.g.*, United States v. Siegel, 717 F.2d 9, 14-16 (2d Cir.

The courts have also been expanding the nexus between a mailing and a scheme to defraud. The Supreme Court has held that a defendant does not have to contemplate the use of the mails, only that the mailing be reasonably foreseeable and "incident to an essential part of the scheme."[96] Expressed another way, "[t]he requisite statutory purpose exists if the alleged scheme's completion could be found to have been dependent in some way upon the information and documents passed through the mails."[97] Likewise, in wire fraud cases, the courts only require that the use of the wires be foreseeable and not that the use of the wires advance the fraudulent scheme.[98] Finally, each mailing or use of the wires constitutes a separate offense even where multiple mailings or uses are part of the same scheme.[99]

Despite their broad scope, criminal prosecutions under these two statutes are limited by federal prosecutorial discretion. The United States Department of Justice considers prosecution for mail fraud only where a scheme is aimed at "a class of persons or the general public," and encompasses "a substantial pattern of conduct."[100] Otherwise, "the parties should be left to set-

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1983)(shareholder's right to "material" information); United States v. Margiotta, 688 F.2d 108, 123-25 (2d Cir. 1982)(citizen's right to know nature of agreements entered into by leaders of political parties), *cert. denied*, 461 U.S. 913 (1983); United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981)(client's right to "undivided loyalty" of his attorney), *cert. denied*, 456 U.S. 915 (1982); United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir.)(employer's right to honest and faithful service of his employees), *cert. denied*, 447 U.S. 928 (1980).

[96] Pereira v. United States, 347 U.S. 1, 8 (1954).

[97] United States v. Kent, 608 F.2d 542, 546 (5th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

[98] *See* United States v. Hammond, 598 F.2d 1008, 1010 (5th Cir. 1979)(defendant must only intend that communication will help further scheme).

[99] United States v. McDonald, 576 F.2d 1350, 1359 n.15 (9th Cir.), *cert. denied*, 439 U.S. 830 (1978).

As with most other criminal statutes, the courts require a showing of intent to defraud and knowledge of falsity. United States v. Rasheed, 663 F.2d 843, 847-48 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982). However, intent may be inferred from the surrounding circumstances. For example, intent may be established by a showing that the defendant purposefully avoided learning the truth or the defendant recklessly disregarded the truth or falsity. *See, e.g.*, United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983)(reckless disregard for truth or falsity sufficient to sustain conviction), *cert. denied*, 467 U.S. 1216 (1984); United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982)(same), *cert. denied*, 461 U.S. 932 (1984).

[100] United States Attorney's Manual § 9.43.-120 (Feb. 16, 1984).

tle their differences by civil or criminal litigation in the state courts."[101]

In the civil area, the mail and wire fraud statutes are further limited in that the courts have consistently refused to imply private causes of action under these criminal statutes.[102] However, in effect, the Supreme Court in *Sedima* circumvented this rule by permitting private recovery under RICO for violations of the mail or wire fraud statutes. More importantly, because of their scope and reach, the mail and wire fraud statutes should provide an ample basis for suit in most commercial fraud situations.

4. "Pattern of Racketeering Activities"

A "pattern of racketeering activity" requires at least two acts of racketeering activity . . . within ten years of each other.[103] The *Sedima* Court, in *dicta*, observed that the use of the word "requires" implies that while two acts are *necessary* they may not be *sufficient* to satisfy the pattern requirement.[104] More specifically, the Court gleaned from RICO's legislative history that Congress was not concerned with sporadic activity but with activity evidencing "*continuity* plus *relationship*".[105] Although Congress failed to define the word "pattern" in RICO, another title of the Organized Crime Control Act provides that criminal conduct forms a pattern "if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[106] The *Sedima* Court hinted that this definition may be useful in

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[101] *Id.*

[102] *See, e.g.*, Ryan v. Ohio Edison Co., 611 F.2d 1170, 1178-79 (6th Cir. 1979)(mail fraud is bare criminal statute with no intent to create private cause of action); Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 (5th Cir. 1974)(wire fraud act does not create additional federal question jurisdiction in civil cases), *cert. denied*, 423 U.S. 837 (1975). The Supreme Court has never addressed this issue.

[103] 18 U.S.C. § 1961(5) (1982).

[104] *Sedima*, 473 U.S. at 496 n.14 (emphasis added).

[105] *Id.* (citing S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969)).

[106] 18 U.S.C. § 3575(e) (1982)(provision in Title X of Organized Crime Control Act for increased sentence for dangerous special offenders).

interpreting the meaning of "pattern" in RICO.[107]

Soon after *Sedima*, one district court acted upon the hint of the *Sedima* Court and limited civil RICO by applying a more stringent pattern requirement. In *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*,[108] Judge Shadur of the Northern District of Illinois rejected pre-*Sedima* authority of the Seventh Circuit which held that acts, i.e., multiple mailings in furtherance of a single criminal episode, were sufficiently related to constitute a pattern.[109] Judge Shadur reasoned that:

> True enough, "pattern" connotes similarity, hence the [Seventh Circuit] cases' proper emphasis on relatedness of the constituent acts. But "pattern" also connotes a multiplicity of events: surely the continuity inherent in the term presumes repeated criminal *activity* not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."[110]

In *Trak Microcomputer Corp. v. Wearne Bros.*,[111] the chief judge of the Northern District of Illinois, Judge McGarr, disagreed with Judge Shadur's conclusion that a pattern requires acts in furtherance of multiple schemes:

> In determining the meaning of a 'pattern of racketeering activity,' this court is bound to the language of the RICO statute. That act defines what a 'racketeering activity' is. The act does not suggest that a 'pattern of racketeering' means a pattern of fraudulent schemes; it merely requires a pattern of 'racketeering activity'. *Sedima* does not compel a contrary interpretation. Nothing in the language of *Sedima* suggests that in order to find a 'pattern of racketeering activity,' a pattern of fraudulent schemes must be pled. Rather, *Sedima* only requires that the racketeering activity be continuous and related.[112]

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[107] *Sedima*, 473 U.S. at 496 n.14.

[108] 615 F. Supp. 828 (N.D. Ill. 1985).

[109] *Id.* at 831-33 (citing United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir. 1981)); United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978)).

[110] *Inryco*, 615 F. Supp. at 831.

[111] 628 F. Supp. 1089 (N.D. Ill. 1985).

[112] *Id.* at 1096.

The court then held that multiple acts of mail and wire fraud that "were related to one another in furtherance of the alleged fraudulent scheme . . . satisfy the continuity plus relationship standard of *Sedima*."[113] In *Graham v. Slaughter*,[114] Judge Getzendanner, another district judge in the Northern District of Illinois, disagreed with her two colleagues. After approving of Chief Judge McGarr's rejection of the *Inryco* requirement of a pattern of fraudulent schemes, Judge Getzendanner stated that:

> [This] court nonetheless agrees with Judge Shadur's analysis in *Inryco* that the term "pattern" connotes not only a relatedness but a multiplicity of events . . . . Where this court differs with *Inryco* is in the implication that a single fraudulent effort or episode should be equated with a single scheme.
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> Generally, to be related, the predicate acts . . . must involve common perpetrators, methods of commission, victims or motive . . . . To be "continuous," more than sporadic or isolated activity must be alleged. In this court's view, that requires more than a single transaction but not necessarily more than a single scheme . . . . In other words, while a RICO claim must involve different criminal episodes, i.e., transactions "somewhat separated in time and place," [quoting United States v. Moeller, 402 F. Supp. 49, 57 (D. Conn. 1975)] an open-ended scheme may include a sufficient number of independent criminal episodes to satisfy the "continuity" factor of *Sedima*.[115]

Other courts, such as the Fifth Circuit, have avoided these metaphysical distinctions and have held that two related predicate acts are sufficient to allege a civil RICO claim.[116] Unless Congress amends RICO to redefine "pattern," the courts remain free to choose a definition on the spectrum lying between the narrow multiple fraudulent scheme test of *Inryco* and the broad

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[113] *Id.*

[114] 624 F. Supp. 222 (N.D. Ill. 1985).

[115] *Id.* at 224-25.

[116] *See, e.g.*, R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985)(*Sedima* implied two isolated acts are not pattern, but alleged acts of mail fraud are related).

related acts test of the Fifth Circuit.[117] It appears that the choice depends on a court's view of which branch, the legislative

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[117] After *Sedima*, the circuit courts of appeal have begun to choose positions on the pattern spectrum. The Eleventh Circuit has held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts." Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986). The standard is whether each act is a separate and distinct statutory violation. *Id.* Although the Fifth Circuit appeared initially to side with the Eleventh Circuit, *see* R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1357 (5th Cir. 1985)(related acts of fraud can constitute pattern), in a subsequent opinion it suggested that the question remained open. *See* Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 785 F.2d 1274, 1280 n.7 (5th Cir. 1986)(*Sedima* appears to favor more rigorous interpretations; consider meaning of "pattern" in context of facts actually developed). Conversely, the Eighth Circuit chose the other end of the spectrum and held that where the predicate acts comprise "one continuing scheme" and defendants had neither committed the predicate acts in the past nor engaged in other criminal activities elsewhere, there was an insufficient relationship to establish a pattern. Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986).

Although the Seventh Circuit initially did not definitively address the issue, *see* Lipin Enters., Inc. v. Lee, 803 F.2d 322, 324 (7th Cir. 1986)(not necessary to formulate exact definition of pattern to dispose of case), the court recently chose a middle ground approach:

> In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate act must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., "transactions 'somewhat separated in time and place.' " Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement. The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative.

Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986)(citations omitted).

Likewise, the Fourth Circuit recently rejected the approaches of the Eighth and Eleventh Circuits and elected to follow a middle ground approach: "[w]hat constitutes a RICO pattern is a matter of criminal dimension and degree" which focuses on "unlawful activities whose scope and persistence pose a special threat to social well-being." International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987). In addition, the Tenth Circuit, although emphasizing the requirement of a threat of continuing activity and not isolated events, refused recently to formulate a "bright-line" test. Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987). Finally, while acknowledging the *Sedima* Court's observations on the definition of pattern, the Third and D.C. Circuits have not had the direct opportunity to apply them. *See* Berg v. First American Bankshares, Inc., 796 F.2d 489, 501 (D.C. Cir. 1986)(RICO claim dismissed on other grounds but Court recognized *Sedima* standard); United States v. Grayson, 795 F.2d 278, 288-90 (3d Cir. 1986)(assumed predicates fell within *Sedima* language without deciding such).

or the judicial, is the proper branch to restrict the scope of civil RICO.

5. *Injury to Business or Property*

Plaintiffs may sue under civil RICO for injury to their business or property "by reason of violation of section 1962."[118] Since this language tracks *verbatim* the language of section four of the Clayton Act, and since the legislative history of civil RICO makes reference to the antitrust laws, questions arise as to whether the judicially imposed requirements of antitrust law are to be incorporated by analogy into civil RICO. Soon after the flood of civil RICO cases reached the federal courts, the courts rejected a "competitive" injury requirement analogous to the competitive injury requirement of antitrust law on the ground that the policies of the two statutes differ.[119] More specifically, while Congress was concerned with protecting competition in enacting the antitrust laws,[120] Congress was concerned with the prevention of the infiltration of legitimate businesses by organized crime in enacting RICO.[121] The courts also rejected the ar-

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[118] 18 U.S.C. § 1964(c) (1982).

[119] *See, e.g.*, Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.)(no limitation on standing to those injured as competitors rather than directly through operation of business), *cert. denied*, 464 U.S. 1002 (1983); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982)(same), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom*, Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008 (1983).

[120] Private antitrust plaintiffs must establish "competitive" or "public" injury, i.e. injury to the overall competitive process, when alleging anticompetitive conduct which is analyzed under the "rule of reason" because overall injury to competition is part of the substantive violation. *See, e.g.*, Stifel, Nicolaus & Co., v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1261 (8th Cir. 1978)(plaintiff who does not allege any public injury must seek relief at common law and not under Sherman Act); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 472 (8th Cir. 1976)(plaintiff must allege facts from which it can be determined that conduct was reasonably calculated to prejudice public interest); Atlantic Heel Co. v. Allied Heel Co., 284 F.2d 879, 883 (1st Cir. 1960)(Sherman Act precludes only contracts or combinations which unreasonably restrain trade); Donlan v. Carvel, 209 F. Supp. 829, 831 (D. Md. 1962)(to recover, plaintiff must allege and prove that public has been adversely affected); *see also* STICKELLS, ANTITRUST LAWS § 197 (1972). On the other hand, where per se violations are alleged, there is no need to provide "public injury" because injury is presumed and there is no need to prove "public injury" as part of the substantive violation. 2 AREEDA & TURNER, ANTITRUST LAW § 331c (1978).

[121] The Seventh Circuit concluded in *Haroco* that "[w]hile a competitive injury might be *sufficient* to sustain a RICO claim, a competitive injury is . . . not *necessary* to state a RICO claim." Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 391

gument that civil RICO should be limited to indirect victims of racketeering since this requirement would prevent suit by different victims and impeded the Congressional intent "of separating racketeers from their profits."[122] Finally, the courts agree that civil RICO does not reach personal injuries, but is limited to injuries to business or property.[123]

Prior to *Sedima*, the lower federal courts disagreed over whether a plaintiff must allege a separate "racketeering injury" analogous to antitrust injury to establish standing to bring suit.[124] The Second Circuit in *Sedima* construed the "by reason of" language in section 1964 to impose a standing requirement that "the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter."[125] The Supreme Court in *Sedima* criticized this definition as "unhelpfully tautological" and refused to find a separate "racketeering injury" in the statute or the legislative history.[126] The Court held that a civil RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the con-

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(7th Cir. 1984), aff'd 473 U.S. 606 (1985).

[122] *Haroco*, 747 F.2d at 392.

[123] *See, e.g.*, Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986)(wrongful death action); Moore v. Eli Lilly & Co., 626 F. Supp. 365, 366-67 (D. Mass. 1986)(injury from use of drug "Oraflex"); Bast v. A.H. Robins Co., 616 F. Supp. 333, 335 (E.D. Wis. 1985)(injury from use of "Dalkon Shield"); Campbell v. A.H. Robins Co., 615 F. Supp. 496, 500-01 (W.D. Wis. 1985)(same).

[124] *See Haroco*, 747 F.2d at 387-88 & nn.3 & 4 (no clear weight of authority either for or against racketeering injury requirement). The Supreme Court requires that to have standing, a private antitrust plaintiff must prove an "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977). *See also* Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484 (1986)(loss of profits plaintiff would sustain due to possible price competition following merger was not antitrust injury necessary to enjoin merger under Clayton Act).

[125] *Sedima*, 741 F.2d at 496. Justice Marshall in dissent in *Sedima* offered a clearer definition of "racketeering injury" than the Second Circuit: "[i]njury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business, or infiltration of a business or a market, through a pattern of racketeering activity." *Sedima*, 473 U.S. at 498 (Marshall, J., dissenting). The inability of the Second Circuit to formulate a clear definition of "racketeering injury" may have led to its demise.

[126] *Sedima*, 473 U.S. at 493-94.

duct constituting the violation."[127] The Court also agreed with the Seventh Circuit that " '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured'."[128]

This standing requirement raises the question of whether a person who is *indirectly* injured in his business or property by a violation of section 1962 has standing to sue under civil RICO. Unlike the Supreme Court in *Sedima*, the Seventh Circuit in *Haroco* specifically stated that "[t]he criminal conduct in violation of section 1962 must *directly or indirectly* have injured the plaintiff's business or property."[129] However, a post-*Sedima* case in the Seventh Circuit, *Carter v. Berger*, casts doubt whether this rule is still good law in the Seventh Circuit.

In *Carter v. Berger*,[130] the Seventh Circuit held that after a government entity was joined, the taxpayers in a taxpayers' suit lacked standing in a civil RICO action against defendants who bribed county board of appeals employees to obtain lower tax assessments for the property of the clients of the defendants. Judge Easterbrook, joined by Judge (former Professor) Posner and Judge Bauer, interpreted *Sedima* as disapproving of a "RICO injury", but not foreclosing any analogy to the antitrust laws.[131] Thus, based on the "passing on" rule in antitrust law,[132]

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[127] *Id.* at 495-98.

[128] *Id.* at 496-97, *quoting* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (1984), *aff'd*, 473 U.S. 606 (1985).

[129] *Haroco*, 747 F.2d at 398 (emphasis added).

[130] 777 F.2d 1173 (7th Cir. 1985).

[131] *Id.* at 1176.

[132] In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the state of Illinois and certain municipalities brought suit for damages under section 4 of the Clayton Act asserting injury as a consequence of the defendants' alleged conspiracy to fix the price of concrete blocks. Plaintiffs were not direct purchasers, but were two levels removed from the distributor-defendants in the distribution chain. *Id.* Moreover, plaintiffs claimed that the illegal overcharge cascaded down the distribution chain to affect them; in other words, their suppliers "passed on" the overcharge to them. *Id.*

The Supreme Court rejected the offensive use of "passing on" as it had done when presented with a defensive use of "passing on." *Id.* at 729-36. First, the Court was concerned over the ability of the federal courts to handle a complex "passing on" analysis which might involve "massive evidence and complicated theories." *Id.* at 737-44. Second, the Court questioned whether proof of pass-on might be too speculative. *Id.* Finally, the Court concluded that on balance, since indirect purchasers often had only a small stake

the court held that the indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief.[133] However, in *dicta*, the court stated that as in antitrust law,[134] "indirectly injured parties may recover under RICO when they show that the directly injured party was under the continuing control or influence of the defendant or his henchmen."[135]

C. Proscribed Activities Under Rico

Section 1962 imposes liability on persons who have any one of four illegal links with an enterprise through a pattern of racketeering activity. Sections 1962(a) and 1962(b) prohibit the use of racketeering funds[136] to acquire an interest in, to establish or operate an enterprise, or to acquire or maintain an interest in or control of an enterprise through a pattern of racketeering.[137]

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in the outcome of the litigation, direct purchasers had a greater incentive to sue. *Id.* Consequently, only direct purchasers can sue under the antitrust laws for injury due to illegal overcharges. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 488-94 (1968)(Court rejected defense use of "passing on" theory).

[133] *Carter*, 777 F.2d at 1176.

[134] *Id.* at 1178; *see* In re Midwest Mile Monopolization Litig., 730 F.2d 528, 533 (8th Cir. 1984)(court held plaintiffs had claim if within cost plus or functional equivalent to pass on); Arizona v. Shamrock, 729 F.2d 1208, 1213 (9th Cir. 1984)(consumers' action against grocer for retail price-fixing not barred).

[135] *Carter*, 777 F.2d at 1178.

[136] "Racketeering funds" refers to money earned through the illegal activities enumerated in RICO. Such funds are also commonly referred to as "dirty money" or "laundered money."

[137] Section 1962(a) provides in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 USC § 1962(a)(1982).

Section 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. *Id.* at § 1962(b).

Section 1962(c) prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering activity,[138] and section 1962(d) prohibits a conspiracy to commit any of the other three acts.[139] Because of the breadth of sections 1962(c) and 1962(d)[140] and the difficulty in tracing racketeering funds,[141] sections 1962(a) and 1962(b) are rarely used in civil RICO cases.

In most cases, civil RICO actions are brought under section 1962(c) which prohibits anyone "employed by or associated with" an enterprise to "conduct or participate, directly or indirectly" in its affairs through a pattern of racketeering activity."[142] In *Sedima*, the Supreme Court held that "[a] violation of

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[138] Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *Id.* at § 1962(c).

[139] Section 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. *Id.* at § 1962(d).

A violation of the conspiracy subsection requires proof of an agreement to invest in, control, or conduct the affairs of an enterprise by committing the predicate acts of racketeering. However, proof of a conspiracy to commit the underlying predicate acts is insufficient to prove a violation of this subsection. *See, e.g.*, Sevile Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 788, 791 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985).

The courts of appeal are split over whether section 1962(d) requires as a violation of section 1962(c) an agreement personally to commit two acts of racketeering activity. The First and Second Circuits require such an agreement. *See, e.g.*, United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.)(jury must determine guilt of RICO conspiracy on two or more legally significant predicate acts), *cert. denied sub nom.* Rabito v. United States, 105 S. Ct. 118 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981)(RICO conspiracy court must charge as minimum that each defendant agreed to commit two or more predicate crimes), *cert. denied*, 460 U.S. 1011 (1983). The Third and Eleventh Circuits hold that an individual may violate section 1962(d) by merely acquiescing to the commission of predicate acts without agreeing to commit the acts personally. *See, e.g.*, United States v. Adams, 759 F.2d 1099, 1116 (3d Cir. 1985)(need only agree to commission of acts); United States v. Carter, 721 F.2d 1514, 1529-31 (11th Cir.)(agreement to personally commit two or more predicate acts was not required to convict defendant of RICO conspiracy), *cert. denied sub nom.* Morris v. United States, 105 S. Ct. 89 (1984).

[140] McArthur & White, *Civil RICO After Sedima: The New Weapon Against Business Fraud*, 23 HOUS. L. REV. 743, 756 (1986).

[141] *See* BEST, MORAN & WILLIAMS, *The [RICO] Act: Hardly a Civil Statute*, in RICO: EXPANDING USES IN CIVIL LITIGATION 3, 37 (1984).

[142] 18 U.S.C. § 1962(c) (1982).

§ 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[143] However, *Sedima* left several unresolved questions concerning the operation of section 1962(c).

First, the lower federal courts disagree whether an "enterprise" must be distinct from a "person" under section 1962(c). The Eleventh Circuit has held that a corporation at the center of a fraudulent scheme could be both the person and enterprise under section 1962(c); the court reasoned that Congress did not mean to let the central perpetrator, the corporation, escape liability while punishing only the underlings.[144] The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits disagree as to the matter of statutory construction.[145] In *Haroco*, the leading case, the Seventh Circuit resolved the dispute by making a distinction between a violation of 1962(a) and 1962(c):

> . . . As we read subsection (c), the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. As we parse subsection (a), a "person" (such as a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal . . ., and if the person uses the income in the establishment or *operation* of enterprise affecting commerce. Subsection (a) does not con-

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[143] *Sedima*, 473 U.S. at 485.

[144] United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983).

[145] *See* Shofield v. First Commodity Corp. of Boston, 793 F.2d 28, 30-32 (1st Cir. 1986)(§ 1962(c) does not extend liability to enterprise); United States v. Benny, 786 F.2d 1410, 1415-16 (9th Cir. 1986)(RICO was intended to pierce corporate veil for illegal activity); Bennett v. United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985)(indictment alleging defendant's association with sole proprietorship was in violation of RICO was sufficient), *cert. denied*, 106 S. Ct. 800 (1986); Haroco v. American Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 400-02 (7th Cir. 1984)("person" and "enterprise" are distinct for purposes of § 1962(c)), *aff'd on other grounds*, 105 S. Ct. 3291 (1985); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984)(bank must have interacted with defendants to be held liable for RICO); Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982) (no "enterprise" alleged apart from "person") *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom.* Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008 (1983); United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982)(characteristics of legal entity unnecessary for "enterprise"), *cert. denied*, 459 U.S. 1105 (1983).

> tain any of the language in subsection (c) which suggests that the liable person and enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.[146]

Second, the courts disagree over the extent that a defendant must participate in the affairs of the enterprise through a pattern of racketeering activity. Some courts impose the stringent requirement that the defendant must participate in the operation or management of the enterprise.[147] Other courts impose the lesser requirement that the predicate acts be related to or have an effect upon the affairs of the enterprise.[148] Post-*Sedima*

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[146] *Haroco*, 747 F.2d at 401. (footnotes omitted).

[147] *See, e.g.*, Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.)(defendant's participation must be in conduct of affairs of RICO enterprise, which ordinarily will require some participation in operation or management of enterprise itself), *cert. denied sub nom.* Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008 (1983); United States v. Mandel, 591 F.2d 1347, 1375 (4th Cir. 1979)(affirming language of district court that "the 'conduct or participate' language of section 1962(c) requires some involvement or management of the business"), *cert denied*, 445 U.S. 961 (1980); United States v. Kaye, 586 F. Supp. 1395, 1400 (N.D. Ill. 1984)(followed *Bennett;* government must prove defendant participated in management or operation of RICO enterprise); *cf.* United States v. Webster, 639 F.2d 174, 184-86 (4th Cir.)(prosecution required to prove enterprise benefitted in some way from racketeering), *cert. denied sub nom.* Christian v. United States, 454 U.S. 857 (1981).

[148] *See, e.g.*, United States v. Carter, 721 F.2d 1514, 1527 (11th Cir., 1984)(proof of effect upon the common, everyday affairs of enterprise clearly sufficient to support required nexus between enterprise and racketeering activity), *cert. denied sub nom.* Morris v. United States, 105 S. Ct. 89 (1984); United States v. Cauble, 706 F.2d 1322, 1333 & n.24 (5th Cir. 1983)(defendant conducts or participates in conduct of affairs of enterprise if predicate acts have some effect on lawful enterprise prosecution need prove only that the racketeering acts affected the enterprise in some fashion); United States v. Welch, 656 F.2d 1039, 1060-62 (5th Cir. 1981)(§ 1962(c) requires only a sufficient nexus between racketeering activities and affairs of the enterprise), *cert. denied*, 456 U.S. 915 (1982); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980)(participation requires only that predicate offenses are related to activities of enterprise), *cert. denied*, 452 U.S. 961

cases suggest that RICO'S broad remedial purposes and the "directly or indirectly" language in section 1962(c) require only that plaintiff establish some nexus between the pattern of racketeering activity and the enterprise affairs of the enterprise.[149]

Finally, although not addressed by the Supreme Court in *Sedima*, the courts seem to be in agreement on the meaning of "employed by or associated with." In *Schacht v. Brown*,[150] the Seventh Circuit rejected the argument that a RICO defendant must be an insider or manager of the RICO enterprise. The *Schacht* court concluded as follows:

> The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus, the substantive proscriptions of the RICO statute apply to insiders *and outsiders* — those merely associated with an enterprise — who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.[151]

Other federal courts have taken the lead of the Seventh Circuit and agree that the "employed by or associated with" requirement of section 1962(c) should be broadly construed and should reach outsiders associated with the enterprise as well as insiders.[152]

(1981).

[149] *See, e.g.*, Bank of America Nat'l Trust & Sav. Assn. v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986)(RICO does not require defendants to participate in management); Virden v. Graphics One, 623 F. Supp. 1417, 1428-29 (C.D. Cal. 1985)(nexus must exist between racketeering activity and affairs of enterprise).

[150] 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

[151] *Id.* at 1360.

[152] *See, e.g.*, United States v. Tille, 729 F.2d 615, 620 (9th Cir.)(associated outsiders who participated in racketeering fell within RICO), *cert. denied*, 105 S. Ct. 156 (1984); United States v. Starnes, 644 F.2d 673, 679 (7th Cir.)(people did not have to be on legitimate payroll to participate in affairs of enterprise), *cert. denied*, 454 U.S. 826 (1981); United States v. Elliott, 571 F.2d 880, 903 (5th Cir.)(RICO applies to insiders and considers who participates directly or indirectly in racketeering with enterprise), *cert. denied sub nom.* Hawkins v. United States, 439 U.S. 953 (1978); Virden v. Graphics One, 623 F.Supp. 1417, 1428-29 (C.D. Cal. 1985)(there must be nexus between racketeering activity and affairs of enterprise).

The courts also agree that a plaintiff does not have to prove that the enterprise

D. Civil RICO Remedies

Section 1964(c) specifically provides that any "person injured in his business or property by reason of a violation of § 1962" may recover treble damages, costs and attorney's fees.[153] However, it is unclear from the statute whether private plaintiffs are entitled to equitable relief. Section 1964(a) explicitly authorizes the district courts to grant equitable relief, including divestiture of an interest in an enterprise, restrictions on future activities or investments, and dissolution or reorganization of an enterprise;[154] however, the subsection does not specify whether such equitable relief is available in private suits. Moreover, section 1964(b) specifically empowers the Attorney General to seek injunctive relief;[155] however, again, it does not mention private plaintiffs. Finally, section 1964(c), while permitting the recovery of treble damages, costs and attorney's fees,[156] does not address private equitable relief.

Professor Blakey argues that by granting the right to "sue" in section 1964(c) without limitations, Congress intended to allow all necessary and appropriate relief which includes equitable relief.[157] The courts are in disagreement over the issue.[158] Re-

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profited financially from the predicate acts of racketeering; instead, the enterprise could have only been the "tool" or conduit through which the illegal activity was conducted. *See Haroco*, 741 F.2d at 401; United States v. Webster, 669 F.2d 185, 186, 187 (4th Cir. 1981)(issue was not whether enterprise profited from racketeering but whether affairs were conducted through racketeering), *cert. denied*, 456 U.S. 935 (1982).

[153] 18 U.S.C. § 1964(c) (1982).

[154] 18 U.S.C. § 1964(a) (1982).

[155] 18 U.S.C. § 1964(b) (1982 & Supp. III 1985).

[156] 18 U.S.C. § 1964(c) (1982).

[157] Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME LAW. 237, 241 n.15 (1982).

[158] The Fourth Circuit hinted in *dicta* that injunctive relief is not available to a private civil RICO plaintiff. *See* Dan River, Inc. v. Ichan, 701 F.2d 278, 290 (4th Cir. 1983)("[w]hile we do not undertake to resolve the question . . . . [i]n light of the most recent indications from the Supreme Court, Dan River's action for equitable relief under RICO might well fail to state a claim."); *see also* Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983)(same doubts as to propriety of private party injunctive relief); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 489 n.20 (2d Cir. 1984)(altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief), *rev'd* 473 U.S. 479 (1985). *But see* USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97-98 (6th Cir. 1982)(grant of injunctive relief on pendent state claims affirmed where RICO provided federal jurisdiction base).

cently, the Ninth Circuit in *Religious Technology Center v. Wollersheim*,[159] *sua sponte*, raised the issue of whether civil RICO provides private equitable relief. Although the court admitted that section 1964 could be read to permit injunctive relief, the court concluded that the legislative history mandates that injunctive relief is not available to a private party in a civil RICO action.[160] The court also found support in the rule that private equitable relief is precluded under the analogous antitrust statute, section 4 of the Clayton Act.[161] Finally, the court justified its holding on Supreme Court precedent which limits the implication of federal causes of action or remedies not expressly provided.[162]

Likewise, one district has not permitted punitive damages

The district courts are likewise divided. *See* Miller v. Affiliated Financial Corp., 600 F. Supp., 987, 994 (N.D. Ill. 1984)(private injunctive relief is not available to private RICO plaintiff); DeMent v. Abbott Capital Corp., 589 F. Supp. 1378, 1382-83 (N.D. Ill. 1984)(private RICO plaintiff could not obtain injunction); and Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983)(claim for private RICO relief dismissed). *But see* Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984)(private claimants in RICO cases may seek equitable relief); Aetna Casualty & Surety Co. v. Liebowitz, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983)(whether preliminary injunctive relief is available to private civil RICO plaintiff is open question), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984).

[159] 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987). In this case, the Church of Scientology sought an injunction under civil RICO to prevent a new splinter church from disseminating materials which allegedly contained trade secrets. *Id.* at 1077-78. Since the sole basis for federal jurisdiction was the civil RICO statute and the only relief requested was injunctive relief, the suit had to be dismissed for want of jurisdiction if private equitable relief were not available under § 1974. *Id.* at 1080-84; *see* FED. R. CIV. P. 12(b)(6)(motion can be made to dismiss action for failure to state claim upon which relief can be granted).

[160] *Religious Technology*, 796 F.2d at 1084-86. The court based its conclusion on two events in the legislative history: first, by including only the private treble damage remedy in its amendments to S. 30, the House rejected private injunctive relief; second, the year after RICO's enactment, Congress refused to amend section 1964 to grant private equitable relief. *Id.* at 1085. See *supra* note 148 for discussion of House amendments to S. 30.

[161] *Religious Technology*, 796 F.2d at 1085-87, citing Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917). Although private equitable relief is not available under section 4 of the Clayton Act, in another section of the Clayton Act, Congress specifically empowered the district courts to grant equitable relief in private antitrust suits. *See* 15 U.S.C. § 26 (1982)(section 16 of Clayton Act codified empowering district courts to grant equitable relief in private antitrust suits).

[162] *Religious Technology*, 796 F.2d at 1087-88, quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

on the ground that the statute specifies the civil remedies and does not provide for punitive damages.[163] However, with the breadth of section 1964 and the "clanging silence" of the legislative history, the remedies available under civil RICO are far from resolved. As the jurisprudence of civil RICO matures and the actions progress past the motion and discovery stages to trial and final judgment, the courts will develop the scope of the damages provision more fully.

E. Civil RICO Procedural Issues

As in every civil action brought in the federal courts, a civil RICO suit must comply with the requirements of the Federal Rules of Civil Procedure. However, by statute, civil RICO has certain unique procedural rules that have raised procedural issues.

1. Jurisdiction and Venue

Section 1964 vests jurisdiction in the district courts by granting an injured person the right to sue "in any appropriate United States district court . . . ."[164] By tracking the language of section 12 of the Clayton Act, the question has arisen as to whether Congress vested exclusive jurisdiction in the federal courts to hear civil RICO cases as in antitrust cases[165] or whether the federal courts have concurrent jurisdiction with the state courts. The state and federal courts are split on this issue. Two federal district courts have held that the state courts enjoy concurrent jurisdiction.[166] On the other hand, at least two state

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[163] *See* Hellerman v. Blank, No. 82-3351 (E.D.N.Y. Nov. 9, 1983)(court rejected demand for punitive damages on ground that statute expressly delineates remedies and does not provide for punitive damages).

[164] 18 U.S.C. § 1964(c) (1982).

[165] *See* General Invest. Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 279 (1922)(§ 12 of Clayton Act did not affect general jurisdiction of district courts but compared § 12 to § 51 of Judicial Code regulating anti-trust cases); Kurek v. Pleasure Driveway & Park Dist., 583 F.2d 378, 379-80 (7th Cir. 1978)(jurisdiction of federal antitrust claims was exclusively in federal courts), *cert. denied*, 439 U.S. 1090 (1979).

[166] *See* Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984)(there is no indication that Congress intended RICO jurisdiction to be exclusively federal); Luebke v. Marine National Bank of Neenah, 567 F. Supp. 1460, 1462 (E.D. Wis. 1983)(presumption of concurrent jurisdiction controls unless Congress explicitly provides

courts have reached the opposite conclusion.[167] Although the question remains unresolved, the Seventh Circuit concluded in *dicta* after *Sedima* that the jurisdiction of the federal courts is concurrent with the state courts because the analogy to antitrust law is not "sufficiently strong" to require exclusive jurisdiction and, there is a presumption of concurrent jurisdiction.[168]

In addition to the scope of subject matter jurisdiction, the scope of personal jurisdiction under civil RICO is also unresolved. Section 1965 provides for liberal personal jurisdiction by allowing nationwide service of process wherever the person "resides, is found, has an agent, or transacts his affairs."[169] Moreover, once jurisdiction is established over one defendant, other defendants may be brought into the suit "if the ends of justice so require."[170] Personal jurisdiction is, of course, tempered by due process considerations.[171] In general, "[W]here such nation-wide service of process is authorized, a federal district court's jurisdiction is 'coextensive with the boundaries of the United States, [and] due process requires only that a defendant in a federal suit have minimal contacts with the United States. . . .' "[172] However, some courts have restricted the personal jurisdiction reach of section 1965 by requiring minimum contacts with the forum state.[173]

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otherwise).

[167] *See* Greenview Trading Co. v. Hershman & Leicher, P.C., 108 A.D.2d 468, 489 N.Y.S.2d 502 (1985)(since Congress modeled civil RICO after antitrust laws, jurisdiction is exclusively federal); LaVay Corp. v. First National Bank of Maryland, No. 83-1020 (Circuit Court Prince Georges County, Maryland)(same).

[168] County of Cook v. Midcon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985).

[169] 18 U.S.C. § 1965(d) (1982).

[170] *Id.*

[171] *See* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)(service of process and notice satisfied due process requirements).

[172] Clement v. Pehar, 575 F. Supp. 436, 438 (N.D. Ga. 1983)(citing FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981)).

[173] *See, e.g.*, Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1132 (D. Mass. 1982)(court concluded there must be connection between out-of-forum defendants and specific acts in forum state for personal jurisdiction of defendants). Section 1965(a), the RICO venue provision, provides that a civil RICO suit may be brought where the defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a) (1982). In construction of section 1965(a), the courts have analogized to the antitrust venue provisions. King v. Vesco, 342 F. Supp. 120, 122 (N.D. Cal. 1972). *See* STICKELLS, ANTITRUST LAWS § 171 (1972). In addition, the RICO venue provision has been construed

2. *Standard of Proof*

The courts have traditionally required three standards of proof, dependent upon the type of claim: beyond a reasonable doubt in criminal cases;[174] clear and convincing in fraud or fraud-like cases;[175] and preponderance of the evidence in all other cases.[176] Many state courts require proof of fraud by clear and convincing evidence.[177] Although the federal courts insist upon the clear and convincing standard in other contexts,[178] the courts have split over whether proof of a civil RICO action must be by a preponderance of the evidence or beyond a reasonable doubt.

The Second Circuit's decision in *Sedima* required, *inter alia*, a prior conviction for one of the predicate acts, forcing the litigant to a higher standard of proof.[179] In reversing the Second Circuit, the Supreme Court stated in *dicta* that "[w]e are not at all convinced that the predicate acts must be established beyond a reasonable doubt" in a civil RICO case.[180] The Court noted that while criminal conduct must be proven beyond a reasonable doubt, in a number of instances the preponderance standard will support civil sanctions for the same conduct.[181] The Court also

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as supplementing the general federal question statute providing for venue in the district "in which the claim arose." 28 U.S.C. § 1391(b) (1982). *See, e.g.*, Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1133 n.6 (D. Mass. 1982)(venue proper where claim arose).

Section 1965(c) provides broad witness subpoena power by permitting service in any judicial district if the action is brought by the United States. 18 U.S.C. § 1965(c) (1982). Otherwise, if a witness "resides in another district at a place more than one hundred miles from the [court]," the judge must first approve upon a showing of good cause. *Id.*

[174] *See, e.g.*, Gilleylen v. State, 255 So. 2d 661, 664 (Miss. 1971)(murder; beyond a reasonable doubt).

[175] *See, e.g.*, Gardner v. Jones, 464 So. 2d 1144, 1149 (Miss. 1985)(fraud must be proven by clear and convincing evidence); Cotton v. McConnell, 435 So. 2d 683, 685-86 (Miss. 1985)(forgery must be proven by clear and convincing evidence).

[176] *See, e.g.*, Producer's Gin Ass'n (AAL) v. Beck, 215 Miss. 263, 60 So. 2d 642, 644 (1952)(court concluded all civil cases are to be proven by preponderance of evidence).

[177] *See, e.g.*, Franklin v. Lovitt Equipment Co., 420 So. 2d 1370, 1373 (Miss. 1982)(fraud must be proven by clear and convincing evidence).

[178] For example, the presumption of patent validity can be overcome only by clear and convincing proof.

[179] *Sedima*, 741 F.2d at 499-500; *see supra* note 80 and accompanying text.

[180] *Sedima*, 473 U.S. at 491.

[181] *Id.* at 3282, citing United States v. One Assortment of 89 Firearms, 465 U.S. 354,

observed that the legislative history of RICO does not indicate that Congress intended to depart from this general rule.[182] Moreover, the Court reasoned that even though the actionable conduct is defined by reference to criminal statutes, the conduct does not have to be established beyond a reasonable doubt or that the consequences of civil liability are the same as the consequences of a criminal conviction.[183] Post-*Sedima* cases have used the strong *dicta* of *Sedima* to require proof only by a preponderance of the evidence.[184]

3. *Statute of Limitations*

While a specific five-year statute of limitations is provided for criminal RICO prosecutions,[185] there is no explicit statute of limitations within which to bring a civil RICO action.[186] The most generally accepted method is to apply the most closely analogous state statute of limitations unless doing so would be inconsistent with federal law or policy.[187] In those states having

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361 (1984)(in rem action under 18 U.S.C. § 924(d)); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972)(forfeiture action under 18 U.S.C. § 545 and 19 U.S.C. § 1948); Helvering v. Mitchell, 303 U.S. 391, 397 (1938)(civil suit by IRS); United States v. Regan, 232 U.S. 37, 47-49 (1914)(private action under Alien Immigration Act).

[182] *Sedima*, 473 U.S. at 490. *See Measures Relating to Organized Crime, Hearings on S.30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 388 (1969)(statement of Asst. Attorney General Wilson); *House Hearings, supra* note 47, at 520 (statement of Rep. Steiger); *id.* at 664 (statement of Rep. Poff); 116 CONG. REC. 35313 (1970)(statement of Rep. Minish).

[183] *Sedima*, 473 U.S. at 491.

[184] *See, e.g.*, United States v. Local 560 of the International Brotherhood of Teamsters, 780 F.2d 267, 279-80 n.12 (3d Cir. 1985)(although defendants in civil RICO actions have significant interests at stake, these interests are not sufficiently compelling to trigger a more stringent burden of proof), *cert. denied*, 106 S. Ct. 2247 (1986).

[185] 18 U.S.C. § 3282 (1982).

[186] The RICO statute does provide a type of *de facto* statute of limitations in § 1961(5). At least one of the predicate acts must have occurred after the effective date of the statute, October 15, 1970, and the last act must have occurred within a ten year period of the commission of a preceding predicate act. Thus, the statute permits a ten-year gap between the commission of the last predicate act and the next preceding act.

[187] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 180-82 (1976)(state statute of limitations applied in federal civil rights action); Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975)(since there was no federal statute of limitations, then state law would be applied); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906)(matter of time limit left to state law since federal law silent); Hunt v. Am. Bank

"little" RICO statutes, the statutes of limitations of these statutes would probably be used;[188] otherwise, the statutes of limitations for common-law fraud, usually six years, could be used.[189]

Since the use of analogous state statutes of limitations does not promote uniformity and predictability, a second less-used method is to apply the closest analogous federal statute, a method which the Supreme Court has approved when the application of state statutes would be inconsistent with the underlying policies of the federal statute.[190] However, no court has yet approved the use of a federal statute of limitations in a civil RICO action. Moreover, since state statutes of limitations were used in federal antitrust actions prior to enactment of an explicit statute of limitations, at least one court has concluded that a state limitation period is consistent with the policies of civil RICO.[191]

& Trust Co., 783 F.2d 1011, 1013 (11th Cir. 1986)(state law applied in federal securities action); Bush v. Rewald, 619 F. Supp. 585, 603 (D. Hawaii 1985)(state statute of limitations applied in RICO action). The basis of this rule is "that Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit." Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

The Supreme Court in Wilson v. Garcia, 471 U.S. 261 (1985), enunciated a three-pronged test to determine whether to apply a state statute of limitations: first, a court must consider whether state or federal law governs the characterization of the claim; second, if federal law applies, a court must determine whether all claims arising under a particular federal law "should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case"; and third, the court must "characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle." *Id.* at 268. Although the Court was considering the most appropriate statute of limitations in a 42 U.S.C. § 1983 action, the Court appears to have announced a general statute of limitations borrowing rule. Malley-Duff & Associates v. Crown Life Insurance Co., 792 F.2d 341, 345 n.9 (3d Cir. 1986).

[188] For example, the statute of limitations for civil actions under Mississippi's "little RICO" statute is five (5) years. MISS. CODE ANN. § 97-43-9(8) (Supp. 1987).

[189] *See* D'Iorio v. Adonizio, 554 F. Supp. 222, 232 (M.D. Pa. 1982)(action for fraud is state cause of action most analogous to RICO claim).

[190] *See* Occidental Life v. E.E.O.C., 432 U.S. 355, 367 (1977)(state statutes of limitation will not be borrowed if inconsistent with state law).

[191] State Farm Fire & Cas. Co. v. Estate of Caton, 540 F. Supp. 673, 684 (N.D. Ind. 1982)(RICO patterned after antitrust law which looked to state law; Congress intended to look to state law in RICO), *rev'd on other grounds*, Ashland Oil, Inc. v. Arnett, 656 F.

4. *Pleading "With Particularity" Under Rule 9*

When a plaintiff uses mail, wire, or securities fraud as a predicate act, the federal courts require that civil RICO claims be pled with particularity.[192] However, the courts are divided on the degree of specificity required to allege a civil RICO claim. In *Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co.*[193] the district court noted that the statutory definition of "pattern of racketeering activity" requires a showing that a defendant committed at least two "indictable" predicate acts.[194] The district court reasoned that since a federal grand jury can only return an indictment upon a showing of probable cause, a civil RICO plaintiff must plead with sufficient specificity to establish probable cause that the predicate acts were committed.[195] Moreover, in order to determine whether or not there is probable cause to believe that the defendant committed the predicate acts, the court required "a factual statement similar to

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Supp. 950 (N.D. Ind. 1987).

[192] *See, e.g.*, Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983)(civil RICO claim dismissed due to failure to state securities fraud law), *cert. denied*, 104 S. Ct. 1280 (1984).

Generally, the Federal Rules of Civil Procedure require only that a complaint be "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Furthermore, Rule 8(e)(1) states that "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1). However, Rule 9(b) requires that "[i]n all averments of fraud . . . the circumstances constituting fraud *shall* be stated *with particularity*." FED. R. CIV. P. 9(b) (emphasis added). Since fraud encompasses a wide range of conduct, the particularity rule has been justified to permit a defendant adequate time to prepare a response. Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1306 n.5 (D. Colo. 1984)(citations omitted). Moreover, the particularity requirement has been justified by the need to protect the reputations of innocent parties from claims involving moral turpitude, to protect against fraud actions that are strike suits, and to apprise defendants sufficiently of the nature of the claims to allow an adequate response. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 399-400.

Instead of viewing the particularity requirement as conflicting with the notice pleading concept, Rule 9(b) should be viewed as a specialized exception. Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 B.Y.U.L. REV. 55, 90. As a result, a plaintiff may plead other parts of his case generally, but must plead fraud allegations with specificity to avoid frivolous or strike suits and to give a defendant adequate information to prepare a response. *Id.* (footnotes omitted).

[193] 558 F. Supp. 1042 (D. Utah 1983).

[194] *Id.* at 1045.

[195] *Id.* (citations omitted).

a bill of particulars . . . ."[196]

In *Haroco*, the Seventh Circuit rejected this stringent pleading requirement as shifting proof of the predicate acts from the trial stage to the pleading stage.[197] The court approved a complaint which "adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved."[198] The court reasoned that "the identification of the transactions and the description of the alleged scheme to defraud put defendants on fair notice of the time and place of the alleged false representations."[199] Furthermore, the court concluded that "[t]here would have been little point in requiring plaintiffs to expand the complaint by also identifying *each notice* . . . ."[200]

In sum, in order to plead a fraudulent scheme, the courts view the specificity requirement of Rule 9(b) as requiring the plaintiff to allege a fraudulent scheme, but in various degrees, ranging from probable cause to "bare bones."[201] Because of the liberal amendment policy of the Federal Rules of Civil Procedure, the courts generally allow civil RICO plaintiffs to correct particularity defects by amendment.[202] However, if a plaintiff

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[196] *Id.* at 1045-46. *See also* Taylor v. Bear Stearnes & Co., 572 F. Supp. 667, 682-83 (N.D. Ga. 1983)(civil RICO complaint must show either prior criminal convictions or set out probable cause). *Sedima* eliminated the prior criminal conviction requirement. *Sedima*, 473 U.S. at 493.

[197] *Haroco*, 747 F.2d at 404.

[198] *Id.* at 405.

[199] *Id.* (citations omitted).

[200] *Id.*

[201] Miscellaneous Service Workers, Drivers & Helpers v. Philco Ford Corp., 661 F.2d 776, 782 & n.16 (9th Cir. 1981). "[T]he pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *See* Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)(absence of statements of times, dates, and places of fraudulent involvement contrary to purpose of Rule 9(b)); Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 611 (9th Cir. 1977)(statements of time, place and nature of alleged fraudulent activities will withstand lack of particularity attack under Rule 9(b)); *see also* Lewis v. Sporck, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985)(allegations of mail fraud under section 1962(a)-1962(c) must identify the time, place, and manner of each fraud, plus the role of each defendant in each scheme).

[202] *See, e.g.*, Ray v. Karris, 780 F.2d 636, 645 (7th Cir. 1985)("[C]omplaints are to be read liberally as required by the notice pleading theory . . . . For this reason alone plaintiffs should be entitled to amend their pleadings . . . .").

seeks preliminary injunctive relief,[203] this delay may prove to be harmful; moreover, excessive specificity may result in a motion for summary judgment.

5. *Arbitration*

Another issue over which the federal courts have been divided is whether civil RICO claims are arbitrable.[204] The importance of this issue in patent law is obvious, since contractual parties may now insert enforceable arbitration clauses controlling questions of patent validity and infringement,[205] but the parties may not arbitrate antitrust claims.[206] Recently the Supreme Court resolved this issue in *Shearson/American Express, Inc. v. McMahon*,[207] holding that a civil claim under RICO is arbitrable under the Federal Arbitration Act.[208] In *Shearson*, the respondents were customers of Shearson/American Express, a brokerage firm. Customer agreements between the McMahons and petitioner provided for arbitration of any controversy relating to accounts maintained with Shearson. The McMahons

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[203] The jury is still out on whether equitable relief is available to private plaintiffs under civil RICO. *See supra* notes 153-162 and accompanying text.

[204] The Federal Arbitration Act vests jurisdiction in the federal court to enforce arbitration agreements through appropriate orders and to stay judicial proceedings while arbitrable issues are resolved in arbitration proceedings. 9 U.S.C. §§ 2, 3 (1982). The Supreme Court has construed § 2 to be "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Mose H. Cone Memorial Hosp. v. Mercury Contr. Corp., 460 U.S. 1, 24 (1983). In addition, "[t]he doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself . . . . or a like defense to arbitrability." *Id.* at 24-25 (footnote omitted). The Supreme Court has held that the Congressional policy favoring arbitration outweighs the policy of speedy resolution of disputes by unified, rather than bifurcated, proceedings. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985).

[205] 35 U.S.C. § 294 (1982).

[206] *See, e.g.*, Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974)(antitrust claims deemed inappropriate for arbitration); Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1070 (8th Cir. 1971)(arbiters lack jurisdiction to hold on antitrust laws), *cert. denied*, 404 U.S. 872 (1971); American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 825-26 (2d Cir. 1968)(antitrust claims inappropriate for enforcement by arbitration). *But see* Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth Inc., 105 S. Ct. 3346, 3355-57 (1985)(arbitration permissible on antitrust claims when contractual agreements arise from international transactions).

[207] 107 S. Ct. 2332 (1987).

[208] *Id.* at 2345.

brought suit against Shearson/American Express and its registered representative who handled their accounts, alleging both violation of § 10(b) of the Exchange act and a RICO claim.[209] Petitioners moved to compel arbitration, pursuant to the agreements and § 3 of the Federal Arbitration Act. The United States District Court for the Southern District of New York found that the § 10(b) claims were arbitrable in light of *Dean Witter Reynolds v. Byrd*,[210] but concluded that the RICO claim was not arbitrable "because of the important policies inherent in the enforcement of RICO by the federal courts."[211] The Court of Appeals for the Second Circuit affirmed the decision as to the RICO claim, stating that arbitration was inappropriate since a RICO plaintiff is in the nature of a "private attorney general" acting in the public interest.[212] On certiorari, the Supreme Court found nothing in the text of the RICO statute or its legislative history to evidence a congressional intent to exclude civil RICO claims from the Arbitration Act.[213] Therefore, the Court concluded, the burden was on the respondents to show an "irreconcilable conflict" between arbitration and the purposes underlying RICO.[214] Relying on its opinion in *Mitsubishi Motors Corp. v. Solor Chrysler-Plymouth, Inc.*,[215] the Court rejected arguments that RICO claims are too complex for arbitration.[216] The

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[209] *Id.* at 2336. Respondents alleged that McNully, a registered representative of Shearson, engaged in fraudulent, excessive trading on accounts and made false statements and omitted material facts in advice given to them in violation of § 10(b) of the Exchange Act and Rule 10b-5. *Id.* Respondents also alleged state law claims for fraud and breach of fiduciary duty. *Id.*

[210] 470 U.S. 213 (1985).

[211] McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384, 387 (S.D.N.Y. 1985), *aff'd in part, rev'd in part* 788 F.2d 94 (2d Cir. 1986), *rev'd* 107 S. Ct. 2332 (1987).

[212] McMahon v. Shearson/American Express, Inc., 788 F.2d 94, 98 (2d Cir. 1986), *rev'd* 107 S. Ct. 2332 (1987).

[213] *Shearson*, 107 S. Ct. at 2343-44.

[214] *Id.* at 2344.

[215] 473 U.S. 614 (1985).

[216] *Id.* Although the decision in *Mitsubishi* that antitrust claims arising out of international transactions was limited to that context, the Court felt that the reasoning in the opinion was equally applicable to the present case. *Id.* In *Mitsubishi*, the Court determined that the potential complexity of a case is not sufficient reason to preclude arbitration and that the "adaptability and access to expertise" typical of arbitration negated the idea an arbitral tribunal could not adequately handle complex litigation. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985).

Court also found that the criminal provisions of RICO do not preclude arbitration of civil actions under § 1964(c).[217] Finally, the Court determined that the argument that the public interest precludes arbitration of RICO claims is without merit.[218] The Court noted that the legislative history of § 1964(c) reveals that the primary emphasis of the statute is to give the victims of organized crime a remedy, with the policing function a secondary concern.[219] Therefore, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[220] Further, the Court found that the private attorney general role for the typical RICO plaintiff is not plausible, since RICO actions are generally brought against legitimate businesses rather than organized crime.[221]

F. Summary of Civil RICO Issues

In sum, the following issues have either been resolved by the Supreme Court or have been agreed upon by the lower courts:

1. the nexus of an enterprise to interstate commerce is minimal;[222]
2. legitimate as well as illegitimate businesses are within the definition of "enterprise";[223]

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[217] *Shearson*, 107 S. Ct. at 2344. The McMahons contended that the "overlap" between the civil and criminal provisions of RICO made such claims nonarbitrable. *Id.* Again the Court returned to the *Mitsubishi* decision, which recognized that treble-damages suits for antitrust violations are arbitrable even though the same conduct may result in criminal liability. *Id.* Further, the Court had previously observed in *Sedima* that "[T]he fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action." *Sedima*, 473 U.S. at 492.

[218] *Shearson*, 107 S. Ct. at 2344-45.

[219] *Id.* at 2345.

[220] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

[221] *Id.* The Court observed that although the drafters of RICO sought to provide vigorous incentives for plaintiffs to pursue actions against organized crime, actions are rarely brought against "mobsters." *Id.* Further, the incentives necessary to spur civil actions against organized crime do not support non-arbitrability of RICO claims against typical defendants. *Id.*

[222] *See supra* note 62.

[223] *See supra* notes 63-64.

3. labor unions, government agencies, and foreign businesses all qualify as "enterprises";[224]
4. convictions of the predicate acts are *not* required;[225]
5. a separate "competitive" injury analogous to the "competitive" injury requirement of antitrust is *not* required;[226]
6. a separate "racketeering" injury is *not* required;[227]
7. personal injuries are *not* compensable under civil RICO;[228]
8. section 1962(c) covers persons outside the enterprise as well as those within;[229]
9. the RICO venue provisions supplement the general federal question venue statute;[230]
10. the appropriate statute of limitations is the most closely analogous state statute of limitations of the forum state;[231]
11. contribution and indemnity are *not* available to civil RICO co-defendants;[232] and
12. RICO actions are arbitrable under federal arbitration statutes.[233]

The following civil RICO issues are still unresolved by the courts:

1. whether an enterprise may be formed by an association in fact which is a group associated only to commit the predicate acts;[234]
2. whether a pattern requires at least two acts of related criminal activity or two acts to effect the same criminal activity, or something in between;[235]
3. whether a person who is indirectly injured in his business or

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[224] *See supra* note 66.
[225] *Sedima*, 473 U.S. at 493.
[226] *See supra* note 119.
[227] *Sedima*, 473 U.S. at 495.
[228] *See supra* note 123.
[229] *See supra* note 152.
[230] *See supra* note 168.
[231] *See supra* note 187.
[232] *See* Central Illinois Sav. & Loan Assn. v. DuPage County Bank of Glendale Heights, 622 F. Supp. 1493, 1499 (N.D. Ill. 1986)(antitrust precedent relied upon in holding Congress did not implicitly or explicitly intend to create right of contribution or indemnity under RICO; no "uniquely federal interest" sufficient to add right to indemnity).
[233] *See supra* notes 204-219 and accompanying text.
[234] *See supra* notes 67-70 and accompanying text.
[235] *See supra* notes 103-117 and accompanying text.

property by a violation of section 1962 has standing to sue under civil RICO;[236]
4. whether an enterprise must be distinct from a person under section 1962(c);[237]
5. whether a civil RICO defendant must participate directly in the affairs of an enterprise through a pattern of racketeering;[238]
6. whether equitable relief is available to civil RICO plaintiffs;[239]
7. whether federal district courts have exclusive jurisdiction over civil RICO claims or share concurrent jurisdiction with the state courts;[240]
8. whether civil RICO defendants must have minimum contacts with the forum state to permit personal jurisdiction;[241]
9. whether civil RICO claims must be proven beyond a reasonable doubt or by a preponderance of the evidence;[242] and
10. whether civil RICO claims must be pled to the degree of specificity in a criminal bill of particulars.[243]

III. Intellectual Property and Civil RICO

Despite these unresolved issues, and unless Congress or the courts restrict its application, civil RICO has a potential use in conjunction with the remedies provided under the intellectual property laws.[244] In the past, intellectual property owners were limited to traditional federal infringement remedies except in cases of particularly egregious anticompetitive conduct, where

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[236] *See supra* notes 127-135 and accompanying text.
[237] *See supra* notes 57-70 and accompanying text.
[238] *See supra* notes 103-117 and accompanying text.
[239] *See supra* notes 153-162 and accompanying text.
[240] *See supra* notes 165-168 and accompanying text.
[241] *See supra* notes 169-173 and accompanying text.
[242] *See supra* notes 174-184 and accompanying text.
[243] *See supra* notes 192-203 and accompanying text.
[244] This article does not suggest that civil RICO remedies should be duplicative of the remedies afforded under the intellectual property statutes. The courts have yet to address the problem of possible duplicative recovery for the same conduct. *See* Alcorn County, Miss. v. Interstate Supplies, 731 F.2d 1160, 1170 n.16 (5th Cir. 1984)("particularly thorny problem"). Civil RICO should only be used to afford complete relief to injured parties. *Cf.* Ramada Inns, Inc. v. Gadsden Motel Co., 804 F.2d 1562, 1566 (11th Cir. 1986)(fact that common element used to calculate two damage awards did not result in double recovery because damages were awarded for two distinct wrongs).

antitrust claims were permissible.[245] However, after *Sedima*, civil RICO offers a remedial scheme which has not been limited by a judicially created antitrust-like standing requirement,[246] but the path to treble damages and attorneys' fees is not free of obstacles. First, Congress may limit civil RICO[247] or the courts may incorporate by analogy other stringent antitrust rules.[248] Second, the Supreme Court recently slowed the expansion of federal intellectual property remedies, particularly into the copyright area. In *Dowling v. United States*,[249] the Court eliminated the National Stolen Property Act,[250] a RICO predicate act, from the federal arsenal in the fight against criminal copyright infringement. The Supreme Court held that the National Stolen Property Act could not be used to impose criminal liability for acts of copyright infringement; more specifically, the Court held that the criminal provisions of the Copyright Act[251]

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[245] *See, e.g.*, Walker Process Equipment, Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172, 175 (1965)(potential for Sherman Act § 2 violation where "fraud on the Patent Office" committed).

Of course, state law claims, where appropriate, could be joined to the federal claims under pendent jurisdiction. *See, e.g.*, Ford Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975, 997-98 (D. Minn. 1986)(joinder of state unfair competition claim).

[246] See *supra* notes 118-123 and accompanying text for discussion of a competitive injury requirement under the antitrust laws.

[247] *See supra* notes 54-66 and accompanying text.

[248] The Seventh Circuit has already injected the *Illinois Brick* passing-on rule into civil RICO. *See supra* note 132 and accompanying text.

[249] 473 U.S. 207 (1985).

[250] 18 U.S.C. § 2314 (1982).

[251] 17 U.S.C. § 505 (1982); 18 U.S.C. § 2319 (1982).

The *Dowling* Court also examined the legislative history of the National Stolen Property Act to determine whether copyright infringement was within its scope. The Court found that in enacting the National Stolen Property Act, Congress had acted pursuant to its Commerce Clause power to fill in gaps left by state enforcement in areas near the state lines.

Prior to 1919, in areas close to the state lines, state law enforcement officials were impeded by the flight of car thieves across state lines. In 1919, to close the gap, Congress passed the National Motor Vehicle Theft Act, Pub. L. 70, 41 Stat. 324 *codified at* 18 U.S.C. § 2312. In 1934 Congress closed an identical enforcement gap when it extended the provisions of the National Motor Vehicle Theft Act to other stolen property" by means of the National Stolen Property Act of May 22, 1934, 48 Stat. 794. *See* S. REP. No. 538, 73d Cong., 2d Sess., 1 (1934); H.R. REP. No. 1462, 73d Cong., 2d Sess., 1 (1934); H.R. CONG. REP. No. 1599, 73d Cong., 2d Sess. 1, 3 (1934).

Since the Constitution, Art. I, § 8, cl. 8, empowers Congress to legislate directly in the copyright area, the Court concluded that Congress could not have intended to com-

are the exclusive weapon against criminal copyright infringement.

In *Dowling*,[252] the Court concluded that copyrighted works

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bat the problem of copyright infringement through the Commerce Clause-based National Stolen Property Act. *Dowling*, 473 U.S. at 220-21.

Moreover, the Court noted that Congress had acted "with exceeding caution" in imposing criminal sanctions for copyright infringement over the years and had "carefully calibrated the penalty to the problem." *Id.* at 221-22. Prior to the Copyright Act of 1909, there were no criminal copyright provisions. Under the Copyright Act of 1909, "[a]ny person who willfully and for profit" infringed a protected copyright was guilty of a misdemeanor and subject to penalties of up to one year in jail or a fine between $100 and $2,000, or both. Act of Mar. 4, 1909, § 28, 35 Stat. 1082. However, the criminal provisions of the 1909 Act did not apply to unauthorized mechanical reproductions. In 1974, in response to record piracy, Congress added a subsection to the 1909 Act which provided that one who "willfully and for profit" infringed a copyright in sound recordings would be subject to a fine of up to $24,000 or imprisonment for up to one year, or both. 17 U.S.C. § 104(b)(1975 ed., Supp. V.) In the 1976 revision, Congress extended to motion pictures the penalties formerly applicable to sound recordings. However, in the revision Congress declined to impose felony penalties for copyright infringement involving sound recording and motion pictures. *Dowling*, 473 U.S. at 224. Finally, in 1982, in response to the large-scale bootleggers and pirates, Congress elevated willful and "for commercial advantage" infringement of records, tape, and films to a felony. Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91, *codified at* 17 U.S.C. § 506(a) (Supp. 1985).

The Court was particularly concerned that the single ten-year maximum prison term permitted for a violation of the National Stolen Property Act surpasses by five years the harshest penalty under the copyright laws. *Compare* 18 U.S.C. § 2319 (1982)(five years) *with* 18 U.S.C. §§ 2314, 2315 (1982)(ten years).

Finally, the Court was concerned that inclusion of copyright infringement within the National Stolen Property Act would bring other areas of intellectual property within its scope. The Court reasoned that if " 'the intangible idea protected by the copyright is effectively made tangible by its embodiment' " in goods, "the intangible idea protected by a patent [would] be made tangible by its embodiment in an article manufactured in accord with patented specifications." *Dowling*, 473 U.S. at 227; Diamond v. Diehr, 450 U.S. 175, 186 (1981)(patent); *see* 17 U.S.C. § 102(b) (1982)(copyright).

The Court feared that such a construction of the National Stolen Property Act would impose criminal penalties for distribution of goods infringing valid patents even though Congress had not made such conduct a federal crime under the patent laws, despite its power to do so. *Dowling*, 473 U.S. at 227.

[252] Paul Edmond Dowling was convicted of conspiracy, interstate transportation of stolen property under the National Stolen Property Act, criminal copyright infringement, and mail fraud for activities stemming from a "bootleg" operation involving the unauthorized manufacture and distribution by mail of unreleased Elvis Presley recordings. *Dowling*, 473 U.S. at 208-9. The Ninth Circuit unanimously affirmed the conviction on all counts. Dowling v. United States, 739 F.2d 1445 (9th Cir. 1984). With regard to the mail fraud conviction, the court found the requisite "scheme to defraud" in Dowling's concealment of his intent to manufacture and distribute Elvis Presley recordings from RCA, the copyright owner, in view of an "independent statutory duty" to do so under

embodied in "bootlegged" goods[253] are not "goods, wares or merchandise" which were "stolen, converted, or taken by fraud."[254] Although the Court recognized that the National Stolen Property Act had been applied to items whose value was attributed largely to an intangible component,[255] the Court concluded that there must be "a physical identity between the items unlawfully obtained and those eventually transported, and hence some prior physical taking of the subject goods."[256] The Court held that since copyrights are not considered physical property,[257] then only an overexpanded reading of the National Stolen Property Act would include copyright infringement.[258]

In the wake of *Dowling* and its elimination of the interstate transportation or receipt of copyright-infringing articles as a predicate act under RICO, the question remains whether other

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the copyright statutes. *Id.* at 1449. The court also found a use of the mails through Dowling's mailing of over 50,000 catalogs advertising the "bootlegged" copies. *Id.* The Supreme Court refused to review the mail fraud conviction, but chose instead to grant certiorari only to consider the conviction under the National Stolen Property Act. Dowling v. United States, 469 U.S. 1157 (1985).

[253] The *Dowling* Court distinguished between a "bootlegged" copy and a "pirated" copy. *Dowling*, 473 U.S. at 209-10. A "bootlegged" copy "is one which contains an unauthorized copy of a commercially unreleased performance." *Id.* A "pirated" copy is "an unauthorized copy of a performance already commercially released." *Id.*

[254] *Id.*

[255] *Dowling*, 473 U.S. at 216 (citing United States v. Seagraves, 265 F.2d 876 (3d Cir. 1959)) (geophysical maps identifying possible oil deposits); United States v. Greenwald, 479 F.2d 320 (6th Cir.)(documents bearing secret chemical formula), *cert. denied*, 414 U.S. 854 (1973).

[256] *Dowling*, 473 U.S. at 216.

[257] Under the 1976 Copyright Act, the owner of a copyright has the exclusive rights:

> (1) to reproduce the copyright work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982); *see* 17 U.S.C. §§ 107-118 (1982)(exclusive rights are restricted by certain statutory limitations such as fair use and compulsory licensing).

[258] *Dowling*, 473 U.S. at 216-17.

federal statutes, such as mail and wire fraud, are available as a basis for civil RICO treble damage actions to extend traditional intellectual property remedies. This question is clouded by the Court's repeated references to Congress' careful imposition of criminal liability for copyright infringement and its concern over other areas of intellectual property, particularly patent law. On the other hand, mail and wire fraud are based upon the misrepresentation or concealment of a fact concerning the *use* of the intellectual property right, regardless of the property interest involved.[259] Moreover, the criminal penalties for violation of the mail and wire fraud acts are similar to those for criminal trademark and copyright infringement.[260] Finally, the *Sedima* Court rejected the overlapping argument that the RICO treble damages remedy could not be imposed to predicate act offenses which contained an express private civil damages remedy.[261] In sum, it appears that private civil RICO claims involving intellectual property rights do not fall within the penumbra of *Dowling*, especially in light of the *Sedima* Court's expansive construction of civil RICO. Consequently, in addition to the traditional intellectual property remedies,[262] treble damages for civil RICO violations may be available under the proper circumstances.

A. Patent

In order "to promote the progress of the useful arts,"[263] Congress grants to an inventor of a new, useful, and obvious invention the right to exclude others from making, using, or selling

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[259] GUIDE, *supra* note 5, at 46-47.

[260] *Compare* 18 U.S.C. §§ 2319, 2320 (1982)(copyright and trademark)(maximum fine of $250,000 and imprisonment not more than five years) *with* 18 U.S.C. §§ 1341, 1343 (1982)(mail and wire fraud)(maximum fine of $1,000 and imprisonment not more than five years).

[261] *Sedima*, 473 U.S. at 497-98.

[262] Intellectual property owners are not always the plaintiffs in actions concerning these rights. Intellectual property owners may sue under the federal intellectual property statutes for infringement and under state law for contractual remedies where the rights are licensed. Under some circumstances, such as a situation involving anticompetitive conduct or fraud, an intellectual property owner may be on the defending end of a lawsuit. *See* Handgard, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984)(owner sued for bad faith prosecution of patent infringement suits).

[263] U.S. CONST. art. I, § 8, cl. 8.

a patented invention for a period of seventeen years.[264] In a civil action for patent infringement, the patentee, or assignee,[265] may obtain injunctive relief[266] and recover damages "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."[267]

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[264] 35 U.S.C. §§ 101, 103, 154, 271 (1982). To be patentable, an invention must be within the subject matter of patent, 35 U.S.C. § 101 (1982)("process, machine, manufacture, or composition of matter", must be new, useful, and non-obvious). 35 U.S.C. §§ 101, 103 (1982). *See generally* 1 D. CHISUM, PATENTS (1986)(discussion of requirements for patentability).

[265] The Supreme Court distinguishes between a patent license and an assignment:

> The patentee, or his assigns may, by instrument in writing, assign, grant, and convey, either, 1st, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers: in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement.

Waterman v. McKenzie, 138 U.S. 252, 255 (1891)(citations omitted).

[266] 35 U.S.C. § 283 (1982). Permanent injunctions are customarily issued upon a final adjudication of validity and infringement. *See* Preemption Devices, Inc. v. Minnesota Min. & Mfg. Co., 803 F.2d 1170, 1172 (Fed. Cir. 1986)(permanent injunction issued after finding of patent invalidity); Kloster Speedsteel AB v. Crucible Inc., 793 F.2d 1565, 1569 (Fed. Cir. 1986)(same); Windsurfing Intern. Inc. v. AMF, Inc., 782 F.2d 995, 997 (Fed. Cir. 1986)(same). Preliminary injunctions are issued only upon a "clear" showing of patent validity. *See* Atlas Powder Co. v. Ireco Chemicals, 773 F.2d 1230, 1233 (Fed. Cir. 1985)(court may issue preliminary injunction after patentee "clearly shows" patent valid and infringed); Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1578 (Fed. Cir. 1983)(patentee must show "beyond question" that patent was valid and infringed).

In a civil contempt proceeding for violation of an injunction, the movant must prove a violation by clear and convincing evidence. KSM Fastening Systems, Inc. v. H.A. Jones Co., 776 F.2d 1522, 1524 (Fed. Cir. 1985). If there is a "fair ground of doubt" as to the wrongfulness of the defendant's actions claimed to be contemptuous, the grounds for civil contempt do not exist. MAC Corp. of America v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882 (Fed. Cir. 1985).

[267] 35 U.S.C. § 284 (1982). The Federal Circuit has allowed patentees to recover the traditional monetary award of a reasonable royalty. *See, e.g.*, TWM Mfg. Co. v. Dura Corp., 789 F.2d 895, 899-900 (Fed. Cir. 1986)(court upheld award of reasonable royalties in infringement action); Radio Steel & Mfg. Co. v. MTD Products, Inc., 788 F.2d 1554, 1557 (Fed. Cir. 1986)(same); Railroad Dynamics, Inc. v. A. Stucki Co., 220 U.S.P.Q. 929 (Fed. Cir. 1984)(same). In addition the Federal Circuit has permitted the recovery of lost sales when "but for" the infringement, the patent holder would have made the sales.

Recently, the Supreme Court concluded that prejudgment interest is the rule and not the exception in patent cases.[268] In addition, the court may permit attorneys' fees in "exceptional cases"[269] and, in its discretion, may award treble damages for willful infringement.[270] However, except for violations of the patent marking statute,[271] the patent statutes do not contain a provision for criminal sanctions for patent infringement. In making a finding of patent infringement, which involves intricate questions of law and fact, the courts use a two-step analysis: first, the claims[272] must be interpreted in light of the specification, and prosecution history, and the prior art;[273] second, the

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Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp., 739 F.2d 604, 616 (Fed. Cir. 1984). A patent holder is more likely to be entitled to lost profits when the litigants are the only suppliers. Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065 (Fed. Cir. 1983); *see also*, King Instrument Corp. v. Otari Corp., 767 F.2d 853, 862-63 (Fed. Cir. 1985)(court awarded damages for lost sales based on showing that litigants were only producers of patented item); Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc., 761 F.2d 649, 653 (Fed. Cir. 1985)(same); Paper Converting Machine Co. v. Magna-Graphics Corp., 745 F.2d 11, 21 (Fed. Cir. 1985)(same); Gyromat Corp. v. Champion Spark Plug Co., 735 F.2d 549, 556 (Fed. Cir. 1984)(same). Moreover, punitive damages are recoverable for willful infringement. Bott v. Four Star Corp., 807 F.2d 1567, 1573-74 (Fed. Cir. 1986).

[268] General Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983).

[269] 35 U.S.C. § 285 (1982); *see* Bott v. Four Star Corp., 807 F.2d 1567, 1574 (Fed. Cir. 1986)(willful infringement); Pacific Furniture Mfg. Co. v. Preview Furniture Corp., 800 F.2d 1111, 1115, (Fed. Cir. 1986)(same); Shiley, Inc. v. Bentley Laboratories, Inc., 794 F.2d 1561, 1568, (Fed. Cir. 1986)(same); Bayer Aktiengesellschaft v. Duphar Int'l Research B.V., 738 F.2d 1237, 1242 (Fed. Cir. 1984)(unprofessional conduct of attorney); Rosemount, Inc. v. Beckman Instruments, Inc., 727 F.2d 1540, 1547 (Fed. Cir. 1984)(willful infringement).

[270] 35 U.S.C. § 285 (1982); *see* Bott v. Four Star Corp., 807 F.2d 1567, 1574 (Fed. Cir. 1986)(treble damages for willful infringement); Pacific Furniture Mfg. Co. v. Preview Furniture Corp., 800 F.2d 1111, 1113, (Fed. Cir. 1986)(same); Rosemount, Inc. v. Beckman Instruments, Inc., 727 F.2d 1540, 1548 (Fed. Cir. 1984)(same).

[271] 35 U.S.C. § 292 (1982); *see also* Roman Research, Inc. v. Caflon Co., 210 U.S.P.Q. 633 (D. Mass. 1980).

[272] The claims in a patent specification disclose the scope of the property right in an invention and are analogous to a metes and bounds descriptions in a real property deed. *See* Ashland Oil, Inc. v. Delta Resins & Refractories, Inc., 776 F.2d 281, 293 (Fed. Cir. 1985)(patent claims measure and define invention); SRI Int'l v. Matsushita Elec., Corp. of America, 775 F.2d 1107, 1121 (Fed. Cir. 1985)(same); Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082, 1093 (Fed. Cir. 1985)(same).

[273] *See* Texas Instruments, Inc. v. United States Int'l Trade Comm'n, 805 F.2d 1558, 1568 (Fed. Cir. 1986)(claim interpreted with reference to specifications, prosecution history and other claims in patent); Mannesmann Demag Corp. v. Engineered Metal Prod-

claims must "read on" or "cover" the accused device or process.[274] Both prongs require knowledge of the technological background of the invention. Although infringement is a finding of fact reviewable under the "clearly erroneous"[275] standard, claim interpretation, which is the heart of infringement, is a question of law reviewable under the *de novo* standard.[276] Consequently, the Federal Circuit examines questions of infringement very closely and has disagreed with the interpretations of the district courts.[277]

In addition to the difficulty of proof of infringement, the remedies afforded under the patent statute may be inadequate. Preliminary injunctive relief is difficult to obtain, since the courts require the patent validity be "clearly" established prior to the issuance of a preliminary injunction.[278] Furthermore, al-

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ucts Co., Inc., 793 F.2d 1279, 1282 (Fed. Cir. 1986)(same).

[274] Claims "read on" an infringing device or process when every element or step in the claimed invention is in the infringing device or process. Texas Instruments, Inc. v. United States Int'l Trade Comm'n, 805 F.2d 1558, 1562 (Fed. Cir. 1986). However, to avoid harsh results where the claims do not literally read, the courts developed the equitable doctrine of equivalents to reach inventions which perform substantially the same function in substantially the same way to obtain the same result as the claimed invention. *See* Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 339 U.S. 605, 607-08 (1950)(discussing doctrine of equivalents); Hughes Aircraft Co. v. United States, 717 F.2d 1351, 1361 (Fed. Cir. 1983)(same). At the same time, the courts limited the doctrine of equivalents by developing the equitable doctrine of "file wrapper" or "prosecution history" estoppel, which prohibits the expansion of claims to reach matter relinquished during prosecution. Builders Concrete, Inc. v. Bremerton Concrete Products Co., 757 F.2d 255, 258 (Fed. Cir. 1985)(discussing application of "file wrapper"); Caterpillar Tractor Co. v. Berco, S.P.A., 714 F.2d 1110, 1115-16 (Fed. Cir. 1983)(same); *see also Hughes Aircraft*, 717 F.2d at 1362-63 (same).

[275] ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 1582 (Fed. Cir. 1984). The "clearly erroneous" standard is satisfied "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)(quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

[276] Loctite Corp. v. Ultrasal Ltd., 781 F.2d 861, 866 (Fed. Cir. 1986).

[277] *See, e.g.*, Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565 (Fed. Cir. 1986)(reversing district court judgment as to willfulness of infringement).

[278] Smith Int'l v. Hughes Tool Co., 718 F.2d 1573, 1578 (Fed. Cir. 1983). The Federal Court requires a balancing of the four traditional considerations in the issuance of a preliminary injunction: the probability of success on the merits, immediate irreparable harm to the movant if not granted, the harm to other interested parties if the injunction is granted or not granted, and the public interest. *Id.* at 1578-79. However, "where validity and continuing infringement have been established . . . immediate irreparable harm

though the Federal Circuit has expanded the scope of damages recoverable for infringement to include lost profits,[279] treble damages are not automatic; they can only be awarded in the event of willful infringement.[280] Finally, attorneys' fees can be awarded only in "exceptional" cases.[281]

Under the proper circumstances, civil RICO offers a patentee the potential to recover automatic treble damages and attorneys' fees. At a minimum, this requires a relationship, contractual or otherwise, between the patentee and other parties. A patentee may also incur civil RICO liability for acts committed during the course of a commercial relationship, providing that civil RICO is indeed a "two-edged" sword.

1. Patent Procurement

Before an inventor may bring infringement actions, the United States Patent and Trademark Office (PTO) must issue a patent to that inventor. The long road to the grant of a patent begins with the filing of an application in the PTO.[282] The application is examined by a patent examiner to determine whether it meets the statutory requirements.[283] Once the examiner is satisfied, either upon initial review or following appeal,[284] that all requirements have been met, the PTO issues a patent. Only at this point does the exclusive right granted by Congress attach.[285]

With the exception of interference proceedings,[286] the pro-

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is presumed." *Id.* at 1581.

[279] *See supra* note 267.

[280] *See supra* note 270.

[281] *See supra* note 269.

[282] For a brief outline of the patent procurement procedure, see generally D. CHISUM, PATENTS (1986).

[283] *See supra* note 264.

[284] Appeals from the United States Patent and Trademark Office can go either directly to the United States Court of Appeals for the Federal Circuit or to the United States District Court for the District of Columbia. 35 U.S.C. §§ 141, 145 (1982). However, if the district court route is used, an appeal of a final judgment of the district court goes to the Federal Circuit. 28 U.S.C. § 1294(a)(4)(C) (1982).

[285] *See* 35 U.S.C. § 271 (1986)(infringement of patent).

[286] Interference proceedings determine priority of invention when there is dispute over who is the true inventor. Some of the factors taken into consideration are the respective dates of conception and reduction to practice of the invention and the reasonable diligence of one who first conceived the invention. *See* 35 U.S.C. §§ 102(g), 135

ceedings before the PTO are *ex parte*. Thus, in judicial *ex parte* proceedings,[287] the PTO demands a high degree of candor from applicants. Applicants and their attorneys, or agents, must disclose all material information, and they must not submit false or misleading material information during prosecution.[288] Otherwise, the applicant will have committed "fraud on the Patent Office" or "inequitable conduct"[289] and all claims on the patent

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(1982)(priority and interference in application process); 37 U.S.C. §§ 601-688 (1986)(interference between applicants).

[287] Attorneys, as officers of the court, always owe an uncomprimising duty of candor toward the court. Pesaplastic C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522 (11th Cir. 1986). *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); *accord* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2), DR 7-106(B)(1) (1981).

[288] 37 C.F.R. § 1.56 (1986). The "duty of candor" rule provides in part:

> (a) A duty of candor and good faith toward the Patent and Trademark Office rests on the inventory, on each attorney or agent who prepares or prosecutes the application and on every other individual who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor, with the assignee or with anyone to whom there is an obligation to assign the application. All such individuals have a duty to disclose to the Office information they are aware of which is material to the examination of the application. Such information is material where there is a substantial likelihood that a reasonable examiner would consider it important in deciding whether to allow the application to issue as a patent. The duty is commensurate with the degree of involvement in the preparation or prosecution of the application.

37 C.F.R. § 1.56 (1986).

[289] J.P. Stevens & Co. v. Lex Tex Ltd., Inc., 747 F.2d 1553, 1561 (Fed. Cir. 1984). Since the claims are not *invalid*, a patentee should be able to redeem himself through acts of contrition.

The Federal Circuit makes a distinction between common law fraud and inequitable conduct. Common law fraud requires: "(1) misrepresentation of a material fact, (2) intent to deceive or a state of mind so reckless respecting consequences as to be the equivalent of intent (scienter), (3) justifiable reliance on the misrepresentation by the party deceived, inducing him to act thereon, and (4) injury to the party deceived, resulting from reliance on the misrepresentation." *Id.* at 1559 (citing Norton v. Curtiss, 433 F.2d 779, 793 (Fed. Cir. 1970)). In contrast, inequitable conduct includes "failure to disclose material information, or submission of false material information, with an intent to mislead." *Id.* Materiality can be established by any of four tests: "(1) objective 'but for'; (2) subjective 'but for'; (3) 'but it may have been'; and (4) PTO Rule 1.56(a), i.e., whether there is a substantial likelihood that a reasonable examiner would have considered the omitted reference important in deciding whether to allow the application to issue as a patent." *Id.* Intent need not be proven by direct evidence but "may be proven by showing acts the natural consequences of which are presumably intended by the actor." *Id.* at 1560. Proof of deliberate scheming is not required; intent may be established by gross negligence which "is present when the actor, judged as a reasonable person in his position, should have known of the materiality of a withheld reference." *Id.* The

will be unenforceable and, in extreme cases, antitrust liability arises.[290]

The mail and wire fraud statutes, where applicable,[291] may be used as predicate acts in a civil RICO claim involving inequitable conduct. Consequently, if the elements of wire or mail fraud as well as the other elements of a civil RICO claim can be established, an injured plaintiff may recover treble damages in addition to any contractual remedies. Specifically, an inventor who assigned prosecution of an application to an assignee may be the innocent victim of an assignee's inequitable conduct.[292] In many instances, for various reasons,[293] an inventor does not participate in prosecution and depends upon an assignee to prosecute the application successfully to the issuance of a patent. However, the interests of the applicant/assignor and the assignee in prosecution may differ such that, in the course of prosecution, an assignee may choose alternatives which are not in the best interest of the inventor. Since misconduct by an assignee amounting to inequitable conduct results in unenforceability, an inventor must usually look to contractual remedies under the assignment for redress. However, in many cases, the assignee has limited its liability in the assignment such that an inventor receives inadequate relief.[294] After *Sedima* civil RICO

Federal Circuit has adopted a balancing test: "[q]uestions of 'materiality' and 'culpability' are often interrelated and intertwined, so that a lesser showing of the materiality of the withheld information may suffice when an intentional scheme to defraud is established, whereas a greater showing of the materiality of withheld information would necessarily create an inference that its nondisclosure was 'wrongful.'" American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1363 (Fed. Cir. 1984)(quoting Digital Equip. Co. v. Doamond, 653 F.2d 701, 716 (1st Cir. 1981)).

[290] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176-77 (1965)(antitrust liability for enforcement of patent procured by fraud on patent office); International Wood Processors v. Power Dry, Inc., 792 F.2d 416 (3d Cir. 1986)(antitrust liaility upheld in patent action).

[291] *See* 37 C.F.R. § 1.133 (1982); MANUAL OF PATENT EXAMINING PROCEDURE § 713 (5th ed. 1985).

[292] Unlike most other countries of the world, the United States requires that patent applications be filed in the name of the actual inventor, not an assignee. *Compare* 35 U.S.C. § 261 (1982) *with* STIEFEL & GEVERS, EUROPEAN PATENT AND PRACTICE, art. 54 (1968). The patent statutes do permit an assignment of the patent rights such that a patent application may be prosecuted by an assignee. 35 U.S.C. § 261 (1982).

[293] The most obvious reason to allow others to prosecute a patent is a lack of money.

[294] *But see* Beattie v. Prod. Design & Eng'g, Inc., 173 U.S.P.Q. 757 (Minn. 1972).

may offer additional relief.

In addition, licensees may also have a civil RICO claim against a patentee-licensor who has committed inequitable conduct during prosecution. Although licensees are not compelled to pay royalties under unenforceable patents,[295] licensees may be damaged by the collapse of the licensing arrangement. A licensee may have incurred considerable expense in the negotiation of the license and its subsequent performance. Contractual remedies may be inadequate because of a limitation of liability clause in the license. Thus, under the proper circumstances, civil RICO offers the possibility for treble damages and attorneys' fees to licensees injured in their business or property by reason of a RICO violation.

2. *Patent Exploitation*

Once a patent issues, an inventor obtains the exclusive right to bar all others from making, using, or selling the patented invention for a period of seventeen years.[296] During the life of a patent, an inventor may either exploit the patent personally or license the patent to others, or both.[297] A patent license or assignment[298] is essentially a contractual agreement between a patentee and another party, in which, in exchange for payment of royalties, a patentee agrees not to sue for infringement.[299] Patent license negotiations can be very complex, entailing multiple patents, multiple parties, multiple attorneys, and large sums of money. During the negotiation of these contracts, documents

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The Uniform Commercial Code permits the limitation of remedies. U.C.C. § 2-719.

[295] Lear v. Adkins, 395 U.S. 653, 673-74 (1969).

[296] 35 U.S.C. § 154 (1982).

[297] The choice usually depends on such factors as the ability of the patentee to exploit the invention or the need to license for antitrust reasons. *See generally* L. ECKSTOM, LICENSING IN FOREIGN AND DOMESTIC OPERATIONS (1973); H. MAYERS & B. BRUNSVOLD, DRAFTING PATENT LICENSE AGREEMENTS (2d ed. 1984).

[298] See *supra* note 295 for distinction between a patent assignment and a patent license.

[299] Blonder-Tongue Labs, Inc. v. University of Illinois Found., 402 U.S. 313, 334 (1971)(licensee avoids necessity of defending infringement actions); Radio Tel. & Tel. Co. v. United States, 273 U.S. 236, 242 (1927)(same); Moraine Products v. ICI America Inc., 538 F.2d 134, 149 (7th Cir. 1976)(license is arrangement by which licensee is purchasing right to be free from infringement litigation).

are usually mailed between the parties; furthermore, the telephone is also normally used extensively to complete the negotiations. Thus, the foundation for a civil RICO claim may be laid during the negotiation of a patent license.

A civil RICO claim created by fraudulent conduct during the course of license negotiation offers particular help to a patentee. Under *Lear v. Adkins*[300] a licensee is not required to pay any royalties under an invalid patent. Although the percentage of valid patents is improving with the establishment of the Federal Circuit, the courts declare many patents invalid.[301] In addition, under the collateral estoppel rule of *Blonder-Tongue Laboratories v. University of Illinois Foundation*,[302] once a patent is invalid, it is always invalid. Thus, a patentee might never receive any royalties and would be left without remedy if a patent were later declared invalid. Under the proper circumstances, a civil RICO claim could provide relief to the patentee since civil RICO is a separate federal remedy independent of the patent statutes.[303]

A third party may also have a civil RICO claim under the proper circumstances. Once a patentee, or assignee, discovers

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[300] 395 U.S. 653 (1969). In *Lear*, the Supreme Court abolished the state law licensee estoppel rule, which prevented suits on licensees who challenged patent validity during the term of the license. The licensee estoppel rule was based on the state law contract rule that parties to a contract could not repudiate the contract because of later dissatisfaction with the bargain. *Id.* at 668. The Supreme Court concluded that such a rule must yield to the strong public policies underlying the federal patent system. *Id.* at 673-74.

[301] Even though issued patents are presumed valid, 35 U.S.C. § 282 (1982), many patents are declared invalid by the courts. *See generally* G. KOENIG, PATENT INVALIDITY: A SUBSTANTIVE AND STATISTICAL ANALYSIS (1980).

[302] 402 U.S. 313, 350 (1971). The Supreme Court announced that the sole inquiry in an attempt to relitigate the validity of a patent held to be invalid is "whether a patentee had a full and fair chance to litigate the validity of his patent in an earlier case." *Id.* at 333. The Court concluded that this inquiry would be answered in the negative under narrow circumstances: where the issue is nonobviousness and the standards of Graham v. John Deere Co., 383 U.S. 1 (1965), are not followed; where the courts "wholly failed to grasp the technical subject matter and issues in suit"; and finally, where without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation. *Blonder-Tongue*, 402 U.S. at 333. In the sixteen years since *Blonder-Tongue*, no patent holder has been able to relitigate validity once a district court has held the patent invalid.

[303] A licensee may likewise have a remedy under civil RICO if injury from a fraudulent scheme can be established.

potential infringers, a "ding letter" is normally sent asserting that the third party is infringing. Many times, a license is offered to prevent an infringement suit. If there was either no reasonable basis for infringement[304] or no reasonable basis that the patent was valid,[305] the "ding letter" may be part of a fraudulent scheme to compel licensing.[306] In other words, a patentee may either have no intention of suing or no basis for suit. Again, under the proper circumstances, a civil RICO claim may arise on behalf of a threatened third party.[307]

B. Copyright

Civil RICO may also be used to supplement or supplant the copyright remedies. With the recent advent of personal computers[308] and the growth in the music recording industry,[309] the copyright statutes have become important in the fight against pirates and "bootleggers".[310] Copyright infringement, in addition to carrying the civil penalties of actual or statutory damages, injunctive relief, attorneys' fees, costs, and impoundment,[311] is a criminal offense if the infringement is willful and "for purposes of commercial advantage or private financial gain."[312] In 1982,

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[304] For instance, the patent claims do not read on the infringing device or process. See *supra* note 274 for discussion of infringement of patent claims.

[305] For example, the patentee had knowingly engaged in inequitable conduct. *See supra* note 289 and accompanying text.

[306] *Cf.* Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1295-96 (9th Cir. 1984)(antitrust liability for bad faith patent litigation).

[307] A declaratory judgment action may be brought to seek a declaration of patent invalidity or unenforceability. C.R. Bard v. Schartz, 716 F.2d 874, 882 (Fed. Cir. 1983).

[308] For discussions of the impact of personal computers on copyright, see generally Davidson, *Protecting Computer Software: A Comprehensive Analysis*, 1983 ARIZ. ST. L.J. 611; Gesmer, *Developments in the Law of Computer Software Copyright Infringement*, 26 JURIMETRICS J. 224 (1986).

[309] Prior to 1978, music recordings could not be protected under the federal copyright laws. *Dowling*, 473 U.S. at 211 n.4.

[310] In the recording industry, a "bootlegger" is a person who creates an unauthorized copy of a commercially unreleased performance. *Dowling*, 473 U.S. at 209 n.2 (1985). A "pirate" is a person who creates an unauthorized copy already commercially released. *Id.* In the computer software industry, a pirate is a person who creates unauthorized copies of computer software. Davidson, *supra* note 308, at 615.

[311] 17 U.S.C. §§ 502-505 (1982 & Supp. 1986).

[312] 17 U.S.C. § 506 (1982); *see also* 18 U.S.C. § 2319 (1982)(criminal penalty provision).

Congress also made it a crime to "traffic" in counterfeit labels affixed to, or designed to be affixed to, a phonorecord, motion picture copy or other audiovisual work; however, Congress did not provide civil remedies.[313]

The 1976 Copyright Act defines infringement generally in terms of a violation of the exclusive rights afforded a copyright owner.[314] Consequently, the courts still require that to prove copyright infringement, a plaintiff must establish both ownership of the copyright and unauthorized copying.[315] Although copyright ownership generally poses no problem,[316] proof of unauthorized copying normally requires the use of circumstantial evidence, since direct evidence of copying is seldom available. In such cases, the courts require proof of access and proof of substantial similarity between the original work and the copy.[317] While proof of a reasonable opportunity to copy generally establishes access,[318] proof of substantial similarity entails line-draw-

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[313] 18 U.S.C. § 2318 (1982).

[314] 17 U.S.C. § 501 (1982). Section 501 of the Copyright Act states that "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright." *Id.* at § 501(a). For a discussion of the exclusive rights granted to the owner of a copyright, see *supra* note 252.

[315] Ferguson v. National Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978).

[316] *See* 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 13.01[A] (1987). Professor Nimmer divides copyright ownership into five parts: "(1) [o]riginality in the author, (2) copyrightability of the subject matter, (3) citizenship status of the author such as to permit a claim of copyright, (4) compliance with applicable statutory formalities, and (5) (if the [owner] is not the author) a transfer of rights or other relationship between the author and the [owner] so as to constitute the [owner] the valid copyright claimant." *Id.* at 13-4. A certificate of registration from the Copyright Office constitutes prima facie evidence of all the elements of ownership except for the transfer element. *Id.*; *see* 17 U.S.C. § 410(c) (1982)(in any judicial proceedings, certificate of registration made before or within five years after first publication shall constitute prima facie evidence of validity). Consequently, if there is a transfer, a plaintiff must only introduce the certificate of registration and establish the chain of title from the original registrant to establish prima facie ownership.

[317] M. NIMMER & D. NIMMER, *supra* note 316, § 13.01, at 13-6, 13-6.1, n.26.1. Independent creation is a defense to copyright infringement despite proof of access and substantial similarity. *Id.* at 13-7. Proof of access and substantial similarity only raise a presumption of infringement which is rebuttable by proof of defendant's independent creation of the allegedly infringing work. Original Appalachian Artworks, Inc. v. Toy Loft, 684 F.2d 821, 829 (11th Cir. 1982); *see also* Novelty Textile Mills Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 n.2 (2d Cir. 1977)(same).

[318] M. NIMMER & D. NIMMER, *supra* note 316, § 13.02[A], at 13-10. If the similarity

ing and has not been reduced to a simple test.[319] Furthermore,

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between the two works in issue is sufficiently striking and substantial, access may be inferred. *Id.*, § 13.02[B] at 13-14. A striking similarity is one which is so great as to preclude the possibility of coincidence, independent creation or common source. Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984).

[319] The line between the extremes of no similarity and complete and literal similarity is difficult to draw. Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930)(L. Hand, J.)("line, wherever it is drawn, will seem arbitrary"). Professor Nimmer proposes that substantial similarity be divided into two categories: comprehensive nonliteral similarity and fragmented literal similarity. M. NIMMER & D. NIMMER, *supra* note 316, § 13.03[A], at 13.20.1. In the comprehensive nonliteral similarity case, "the fundamental essence or structure of one work is duplicated in another." *Id.* This concept is limited by two fundamental copyright rules: first, copyright does not protect ideas, 17 U.S.C. § 102(b) (1982); second, copyright infringement is not limited to literal or verbatim copying, *Nichols*, 45 F.2d at 121 ("literal duplication or near identity is not necessary to establish infringement"). The courts have reconciled these two competing rules with the formulation that if the defendant copies not only the idea but also the "expression of the idea" contained in plaintiff's work, the two works are substantially similar. *See* Mazer v. Stein, 347 U.S. 201, 217-18 (1954)(protection given to expression of idea, not idea itself); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977). Judge Learned Hand explained "expressions of an idea" in his famous "abstractions" test:

> [u]pon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas" to which, apart from their expression, his property is never extended.

Nichols, 45 F.2d at 121.

Professor Zechariah Chafee took the Hand "abstractions" test and attempted to delineate the line between expression and idea in his "pattern" test: "the protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." Chafee, *Reflections on the Law of Copyright: 1*, 45 COLUM. L. REV. 503, 513-14 (1945). The pattern test usually results in a point-by-point comparison of the two works to ascertain similarity. *See, e.g.*, Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir. 1983)(13 points of similarity between motion pictures *Star Wars* and *Battlestar: Galactica* held enough to avoid motion for summary judgment); Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F.Supp. 1202, 1207 (N.D. Tex. 1981)(6 points of similarity between television commercials held to constitute substantial similarity.)

The idea/expression dichotomy is avoided in fragmented literal similarity since literal similarity is "always a similarity as to the expression of ideas." M. NIMMER & D. NIMMER, *supra* note 316, § 13.03[A][2] at 13-35. The focus then is on the point where fragmented similarity becomes sufficiently substantial to constitute infringement. The guiding principle is that "[i]f so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another that is sufficient in point of law to constitute a piracy *pro*

the courts do not agree on the proper procedure to establish substantial similarity.[320] Moreover, the rules for substantial similarity were created in response to the unauthorized copying of books and plays which have understandable plots and characters.[321] As a result, the copying of computer programs which do not generally have a readily understandable structure has proven to be especially difficult to fit within these infringement rules.[322]

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tanto." Folsom v. Marsh, 9 F. Cas. 342, 348, (C.C.D. Mass. 1841)(No. 4901)(Story, J.)(emphasis added). Thus, as with "comprehensive nonliteral similarity," the determination of fragmented literal similarity becomes a value judgment. *See* Brodsky v. Universal Picture Co., 149 F.2d 600, 601 (2d Cir. 1945)(musical composition).

[320] The generally accepted analysis for determination of substantial similarity is the ordinary observer or audience test:

> [T]he question really involved . . . is to ascertain the effect of alleged infringing play upon the public, that is, upon the average reasonable man. If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literal piracy of the story, he should detect that fact without any aid or suggestion or criminal analysis by others. The reaction of the public to the matter should be spontaneous and immediate.

Harold Lloyd Corp. v. Witmer, 65 F.2d 1, 18 (9th Cir. 1933).

In Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), the Second Circuit divided this analysis into two parts. First, the trier of fact must determine that there was copying by the defendant. On this issue, the courts permit dissection of the work and expert testimony; the trier of fact is not limited to the spontaneous and immediate impressions of the ordinary observer. *Id.* at 468. Second, after copying is established, the trier of fact must determine whether the copying went so far as to constitute an improper appropriation. On this second issue, "the 'dissection' and expert testimony are irrelevant." *Id.*

In 1977, the Ninth Circuit formulated its own bifurcated procedure based on the idea/expression dichotomy. Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157,1164 (9th Cir. 1977). First, the trier of fact must determine whether there is substantial similarity between the "general ideas" in the two works based on "[s]uch criteria [as] the type of artwork involved, the material used, the subject matter, and the setting for the subject"; the Ninth Circuit labelled this step as the "extrinsic test . . . because it depends not on the responses of the trier of fact, but on specific criteria . . . ." *Id.* In this step, "analytic dissection" of the work and expert testimony are appropriate. *Id.* Second, having found substantial similarity in the "general ideas," the trier of fact must determine "whether there is substantial similarity in the expression of the ideas so as to constitute infringement." *Id.* The court designated this step as the "intrinsic test" because it depends "on the response of the ordinary reasonable person" and does not depend on the "external criteria" of the "extrinsic test." *Id.* In the second step, "analytic dissection and expert testimony" are inappropriate. *Id.*

[321] *See, e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 55-56 (2d Cir. 1936)(play—"Dishonored Lady"); Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930)(Play — "Abie's Irish Rose").

[322] *See* Whelan Associated v. Jaslow Dental Laboratory, 797 F.2d 1222, 1232 (3d Cir.

Once a plaintiff has satisfied the elements of proof of copyright infringement, the district courts may grant preliminary injunctive relief to restrain future copyright violations;[323] permanent injunctive relief is available upon final adjudication.[324] In addition, section 504(b) of the Copyright Act provides that a copyright owner may recover "the actual damages suffered . . . as a result of the infringement, *and* any profits of the infringer that are attributable to the infringement [and have not already been] taken into account in computing the actual damages . . . ."[325] As an alternative to actual damages and profits, a copyright owner may elect, with certain exceptions, to recover statutory damages, which range from $100 to $50,000 per infringement.[326] Moreover, the Copyright Act also provides that an

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1986)(ordinary observer test developed in cases involving novels, plays, and paintings of doubtful value in cases involving computer programs due to complexity and unfamiliarity to most members of public.) The Third Circuit in *Whelan* adopted a single substantial similarity inquiry permitting both lay and expert testimony "in copyright cases involving exceptionally difficult materials, like computer programs." *Id.* at 1233.

[323] 17 U.S.C. § 502(a) (1982). The Fifth Circuit requires that a movant prove four elements to obtain a preliminary injunction: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest." Plains Cotton Coop. Assoc. v. Goodpasture Computer Service, Inc., 807 F.2d 1256, 1259 (5th Cir. 1987). Moreover, a movant must prove each element separately to obtain a preliminary injunction. *Id.* at 1261. *Contra* Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir.)(irreparable injury is presumed upon a finding of likelihood of success on merits), *cert. denied*, 464 U.S. 1033 (1983).

[324] 17 U.S.C. § 502(a) (1982); *see* National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 732 (8th Cir. 1986)(in copyright actions, courts willing to grant permanent injunctions once liability is established and continuing threat to copyright exists).

[325] 17 U.S.C. § 504(b) (1982); M. NIMMER & D. NIMMER, *supra* note 316 §§ 14.02-.03 at 14-6-14.30. The calculation of actual damages is based "upon the extent to which the market value of the copyrighted work at the time of the infringement has been injured or destroyed by such infringement." *Id.* § 14.02 at 14-6.

[326] 17 U.S.C. § 504(c) (1982); *see* Fitzgerald Publishing Co. v. Baylor Publishing Co., 807 F.2d 1110, 1114 (2d Cir. 1986)(copyright owner may elect to receive statutory damages). 17 U.S.C. § 504(c) provides that statutory damages be remitted

> [i]n any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a

award of statutory damages is to be in such amount "as the court considers just" and that "the court . . . may increase the award [and] . . . may reduce the award."[327] However, statutory damages may be inadequate since the district courts have discretion to award statutory damages only within the limits set by Congress.[328]

In *Ford Motor Co. v. B & H Supply, Inc.*,[329] a recent copyright and trademark infringement case, Ford brought suit against multiple defendants involved in an automobile parts counterfeiting scheme. Although the court had little trouble in holding that the defendants' packages infringed Ford's copyrighted speeding car design,[330] the court dismissed the civil RICO claim reasoning that Ford had failed to establish a "pattern" of "racketeering activity". Although the court admitted that the question was a close one, based on recent Eighth Circuit precedent,[331] it held that Ford had only established "a single, continuing scheme to 'pass-off' " counterfeit parts, not a "pattern".[332] Moreover, the court held that Ford had failed to prove that the telephone solicitations and sales by defendants constituted a scheme to defraud.[333] If Ford had been able to establish a fraudulent counterfeiting scheme among the multiple defendants, the court would probably have been more inclined to find the requisite "pattern."

Other scenarios in which civil RICO may be applicable are

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public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

17 U.S.C. § 504(c) (1982).

[327] 17 U.S.C. § 504(c) (1982).

[328] The standard of review for increasing or decreasing statutory damages is abuse of discretion which is defined as a "showing that the district court either made an error of law, or a clear error of judgment, or made findings which were clearly erroneous." Seattle Box Co. v. Indus. Crating & Packing, Inc., 756 F.2d 1574, 1581 (Fed. Cir. 1985).

[329] 646 F. Supp. 975 (D. Minn. 1986).

[330] The court ordered a permanent injunction, forfeiture and destruction of the counterfeit merchandise, actual damages in the amount of $331,000, and attorneys' fees. *Id.* at 990-92.

[331] *Id.* at 1000; *see* Holmberg v. Morrisette, 800 F.2d 205, 209 (8th Cir. 1986)(plaintiff failed to establish pattern of activity); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986)(insufficient proof of pattern of activity).

[332] *B&H Supply*, 646 F. Supp. at 1001.

[333] *Id.*

possible. As with other forms of intellectual property, the exclusive rights granted copyright owners can be licensed.[334] Fraudulent conduct during the course of license negotiations or during the term of the license may result in civil RICO liability.[335] In addition, civil RICO liability may arise where the copyright owner has committed fraud on the Copyright Office when securing its claim to copyright.[336] Unless *Dowling* restricts a copyright owner to the remedial scheme of the 1976 Copyright Act or the courts impose restrictive "pattern" requirements, civil RICO offers an additional federal remedy under the proper circumstances.

C. *Trademark*

Civil RICO may also be used to supplement or supplant the federal remedies provided by the Lanham Act for trademark infringement, particularly in the fight against commercial counter-

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[334] 17 U.S.C. § 201(d) (1982). Copyright licenses must be "in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." *Id.* at § 204(a) (1982). A copyright license "may be recorded in the Copyright Office if [it] bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed documet." *Id.* at § 205(a) (1982). Recordation provides constructive notice of the facts in the document and is a prerequisite to an infringement suit. *Id.* at § 205(c)(e) (1982).

[335] In Fleet Management Systems, Inc. v. Archer-Daniels-Midland Co., 627 F. Supp. 550 (C.D. Ill. 1986), the licensee of a computer program continued to use the computerized truck routing program after termination of the license despite written and telephone assurances to the contrary. *Id.* at 552. The district court dismissed a civil RICO claim based on eight separate instances of mail or wire fraud reasoning that "[a]n isolated criminal episode, though accomplished through a number of fraudulent acts, does not evidence . . . [the requisite] threat of continuing criminal activity." *Id.* at 559 (adopting Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc., 615 F. Supp. 828, 833 (N.D. Ill. 1985)).

[336] Several lower federal courts have held that intentionally false or misleading information in a copyright registration invalidates a copyright or renders it unenforceable. *See, e.g.*, Russ Berrie & Co. v. Jerry Elsner Co., 482 F. Supp. 980, 988 (S.D.N.Y. 1980)(knowing failure to advise Copyright Office of facts which might have occasioned rejection of application constitutes reason for holding the registration invalid); Vogue Ring Creations, Inc. v. Hardman, 410 F. Supp. 609, 615-16 (D.R.I. 1976)(unexplained omission of pre-existing work coupled with other misleading conduct made copyright unenforceable); Ross Products, Inc. v. New York Merchandise Co., 242 F. Supp. 878, 879-80 (S.D.N.Y. 1965)(failure to indicate prior publication of work in Japan raised issue of whether omission was purposeful, thus invalidating copyright).

feiters.[337] The basic test for both common-law and federal statutory trademark infringement is "likelihood of confusion".[338] Under this test, if an appreciable number of reasonable buyers are likely to be confused by similar marks, an action for trademark infringement arises;[339] proof of actual confusion is not a requirement.[340] "Likelihood of confusion" is determined by the totality of the circumstances in each case.[341] Furthermore, the

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[337] The purpose of a trademark is to permit consumers to distinguish between similar goods or services originating from different course. Chevron Chem. Co. v. Voluntary Purchasing Groups, 659 F.2d 695, 702 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126 (1982). Trademarks are classified according to strength, corresponding to the degree of protection afforded by the courts. Generally there are four categories of marks ranging from an arbitrary or fictitious mark, which is strong, to a generic mark, the weakest. A fictitious mark "bears no relationship to the products or services to which it applies, but it readily identifies the producer." Louisiana World Exposition, Inc. v. Logue, 746 F.2d 1033, 1040 (5th Cir. 1984). A suggestive mark " 'suggests,' rather than describes, some characteristic about the product or service, thereby requiring 'the consumer to exercise his imagination to reach a conclusion as to the nature of those goods.' " *Id.* at 1040 (quoting Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1184 (5th Cir. 1980)). A descriptive mark "identifies a characteristic about the product or service" and is only protected "when the primary significance of the trademark in the minds of the consuming public is to identify the producer." *Id.* at 1040 n.7. A generic mark merely refers to a genus or class to which the product or service belongs and is never protectable. *Id.* at 1040.

[338] *See* cases gathered at 2 McCarthy, Trademarks and Unfair Competition, § 23:1 n.1 (2d ed. 1984).

[339] McCarthy, *supra* note 338, at § 23:1 n.6.

Many courts use the "sound, sight, and meaning" trilogy of the Restatement of Torts (First) to determine likelihood of confusion:

> (a) the degree of similarity between the designation and the trademark or trade name in
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> (i) appearance;
>
> (ii) pronunciation of the words used;
>
> (iii) verbal translation of the pictures or designs involved:
>
> (iv) suggestion;
>
> (b) the intent of the actor in adopting the designation;
>
> (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other;
>
> (d) the degree of care likely to be exercised by purchasers.

Restatement of Torts (First) § 729 (1938). *See* cases gathered at McCarthy, *supra* note 338, at § 23:4 n.4.

[340] Proof of actual confusion is relevant to a determination of damages. *See infra* notes 347-49 and accompanying text.

[341] The Fifth Circuit requires that likelihood of confusion be determined by evaluating a variety of factors which include the type of trademark at issue, similarity of design, similarity of product, identity of retail outlets and purchasers, identity of advertising media utilized, defendant's intent, and actual confusion. Marathon Mfg. Co. v. Enerlite Products Corp., 767 F.2d 214, 217 (5th Cir. 1985). However, none of these factors is

circuit courts of appeals are split over whether "likelihood of confusion" is reviewable under the "clearly erroneous" standard as a question of fact or *de novo* as a question of law.[342]

While trademark owners may have enforceable state common law trademark rights,[343] the Lanham Act provides remedies for infringement of federally registered trademarks[344] in the form of injunctive relief and forfeiture of infringing articles; an accounting for profits; monetary damages, including the discretionary awarding of treble damages; attorneys' fees in "exceptional" cases; and costs.[345] In addition, section 43(a) of the Lanham Act also provides a federal cause of action for unfair competition in the form of false advertising or infringement of unregistered marks, names, and trade dress.[346] Finally, under the Trademark Counterfeiting Act of 1984, trademark counterfeiting is punishable through criminal sanctions and *ex parte*

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controlling and "different factors will weigh more heavily from case to case depending on the particular facts and circumstances involved." *Id.* at 218; *see, e.g.*, Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1160 (5th Cir. 1982)(seven factors not exhaustive); Frostie Co. v. Dr. Pepper Co., 341 F.2d 363, 367 (5th Cir. 1965)(court should consider all relevant evidence).

[342] *See* Marathon Mfg. Co. v. Enerlite Products Corp., 767 F.2d 214, 217 (5th Cir. 1985)("likelihood of confusion" treated as question of fact); Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 923 (10th Cir. 1986)(same). *But see* Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 651 (6th Cir.)(likelihood of confusion is question of law), *cert. denied*, 459 U.S. 916 (1982); Alpha Industries, Inc. v. Alpha Steel Tube & Shapes, Inc., 616 F.2d 440, 441 (9th Cir. 1980)(same). In 1982, Justice White, dissenting from a denial of certiorari, recognized the circuit split and would have granted certiorari to resolve the split. Elby's Big Boy v. Frisch's Restaurants, Inc., 459 U.S. 916, 917 (1982)(White, J., dissenting).

[343] Unlike the patent and copyright statutes, the federal trademark statutes do not have a specific constitutional basis other than the Commerce Clause. Trademark Cases, 100 U.S. 82, 94-95 (1879). Therefore, Congress cannot totally preempt state trademark laws, and trademark owners may have both state and federal trademark rights. *Id.* at 96.

[344] Federal registration by the United States Patent and Trademark Office is "prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark . . . ." 15 U.S.C. § 1057(b) (1982).

[345] 15 U.S.C. §§ 1116-1118 (1982). The district courts in a trademark infringement action may also cancel the registration of a mark. 15 U.S.C. § 1119 (1982). *See* Park N' Fly, Inc. v. Dollar Park & Fly, Inc., 105 S. Ct. 658, 667 (1985)(rejecting counterclaim requesting cancellation of "Park N' Fly" logo).

[346] 15 U.S.C. § 1125(a) (1982). Likelihood of confusion is also the touchstone requirement for a section 43(a) violation. Toro Co. v. R & R Products Co., 787 F.2d 1208, 1214 (8th Cir. 1986)(key to finding violation of § 43(a) is determination there was likelihood of confusion, deception, or mistake).

seizure orders.[347] However, the new legislation does not provide enhanced private civil damages for trademark counterfeiting.

Although the Lanham Act specifically provides for monetary recovery in cases of trademark infringement, the traditional remedy is an injunction.[348] While courts will enjoin defendants upon a strong showing of "likelihood of confusion," they generally require "something more" for monetary damages.[349] In considering a request for defendant's profits and "any damages sustained by the plaintiff" under the Lanham Act, the courts often balance such factors as the following: whether the defendant acted willfully, negligently, or innocently; whether plaintiff suffered ascertainable losses; whether customers were actually confused; and whether defendant profited from its infringing conduct.[350] Although the Lanham Act permits the district courts to increase money damages for trademark infringement, the trebling of damages and the increase of an award of profits are not automatic, but remain within the discretion of the district court.[351]

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[347] In 1984, Congress amended the Lanham Act and added new criminal provisions to Title 18 of the United States Code to attack the rising tide of counterfeit goods. Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, 98 Stat. 2178. For a discussion of this new Act, see Comment, *The Trademark Counterfeiting Act of 1984: A sensible Legislative Response to the Ills of Commercial Counterfeiting*, 14 FORDHAM URBAN L.J. 115 (1986).

In one of the first convictions under this new criminal statute, the Fifth Circuit held that lack of knowledge of the criminality of the conduct is no defense. United States v. Baker, 807 F.2d 427, 429-30 (5th Cir. 1986).

[348] 2 MCCARTHY, *supra*, note 338, at § 30:1.

[349] *Id.* at § 30:24.

[350] *Id.*

[351] *See* Holiday Inns, Inc. v. Alberding, 683 F.2d 931, 935 (5th Cir. 1982)(Lanhan Act expressly confers wide discretion upon district judges in determining recovery amount). Section 35 of the Lanham Act provides:

> [w]hen a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to . . . the principles of equity, to recover (1) defendant's profit, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damage the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not ex-

Civil RICO offers private litigants the potential to recover automatic treble damages for trademark counterfeiting, since mail or wire could be used to advertise the counterfeit goods, to offer goods for sale, to transmit an invoice for payment, or to end communications between counterfeiters.[352] Since trademark infringement in the form of a scheme to make or sell counterfeit goods could be a "scheme to defraud", such acts meet the statutory elements for a mail or wire fraud violation.[353] If a pattern can be established, the foundation for a civil RICO claim may be laid to obtain treble damages from counterfeiters in addition to the remedies afforded under the Lanham Act.[354]

Another area for possible civil RICO use is in the so-called "gray market", the domestic market for the unauthorized retailing of trademarked merchandise.[355] Such goods may be acquired

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ceeding three times such amount. If the court shall find the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

15 U.S.C. § 1117 (Supp. 1984).

[352] Cooley, *RICO: Treble Damages and Attorneys Fees in Trademark Counterfeiting Actions*, 73 TRADEMARK REP. 476, 477-78 (1983).

[353] *Id.*

[354] In addition to a copyright claim, Ford Motor Company also sued successfully for trademark infringement and unfair competition of its registered trademarks FORD and MOTORCRAFT in Ford Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975 (D. Minn. 1986).

[355] *See* United States v. Weinstein, 762 F.2d 1522, 1527 (11th Cir. 1985)("diversion" industry presents unique opportunities for development of fraudulent practices), *cert. denied*, 106 S. Ct. 1519 (1986).

Under the Lanham Act, the owner of a trademark can prevent the importation of goods "which shall copy or simulate a trademark registered [on the Principal Register] . . . ." 15 U.S.C. § 1124 (1982). Similar authority is also found in the Tariff Act of 1930, 19 U.S.C. § 1526(a), which provides:

> Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise , or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, . . . and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, . . . unless written consent of the owner of such trademark is produced at the time of making entry.

19 U.S.C. § 1526(a) (1982).

in several ways by the unauthorized retailer: fraudulent misrepresentation to the manufacturer that the goods were intended for export, for use by a non-profit organization, or for consumption by the buyer; reimportation of goods that were exported by a manufacturer or retailer; and the importation of goods manufactured overseas by a subsidiary or affiliate of the U.S. manufacturer.[356] Although diversion of goods into the gray market is not *per se* unlawful,[357] diversion through fraudulent misrepresentation may be in violation of the mail or wire fraud statutes. In addition, the National Stolen Property Act may be used to establish a predicate act if the fraudulently obtained or unlawfully converted goods were transported, sold, or stored in interstate commerce.[358] If the employees of a manufacturer are confederates in the scheme, violation of state law commercial bribery predicate acts may also be alleged.[359]

Finally, civil RICO may be used in general licensing disputes where a trademark owner or his licensee engages in fraudulent conduct during license negotiation or during the term of the license.[360] In *Conan Properties, Inc. v. Mattel, Inc.*,[361]

Under its current regulations, the Customs Service permits importation of "gray-market" goods where the American and foreign trademarks are owned by the same or related entities, or where the American trademark owner authorized the use of the trademark. 19 C.F.R. §§ 133.21(c)(1)-(3) (1985). In 1986, the Court of Appeals for the District of Columbia declared the exemptions to be inconsistent with section 526 of the Tariff Act and thus invalid. Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903, 908 (D.C. Cir. 1986). Conversely, the Second Circuit and the Federal Circuit have upheld the regulations, holding that the Tariff Act provides an independent private cause of action against the importers of such "gray-market" goods even in the absence of the Custom Service's decision not to exclude them. *See* Olympus Corp. v. United States, 792 F.2d 315, 320 (2d Cir. 1986)(American trademark holder may pursue private remedies under Tariff Act despite failure of customs regulations to exclude importation of trademarked goods); Vivitar Corp. v. United States, 761 F.2d 1552, 1569-70 (Fed. Cir. 1985)(Tariff Act provides independent private cause of action against importers of "gray market" goods), *cert. denied*, 106 S. Ct. 791 (1986); *see also* Premier Dental Products Co. v. Darby Dental Supply Co., 794 F.2d 850, 858-59 (3d Cir.)(Tariff Act allows courts to grant injunctions to prevent unauthorized importation of product), *cert. denied*, 107 S. Ct. 436 (1986).

[356] GUIDE, *supra* note 5, at 90-91.

[357] United States v. Weinstein, 762 F.2d 1522, 1527 (11th Cir. 1985).

[358] In *Dowling* the phonorecords, while embodying illegally made copies, were themselves not fraudulently obtained or unlawfully converted. *Dowling*, 473 U.S. at 216-17.

[359] GUIDE, *supra* note 5, at 36.

[360] *See generally*, MCCARTHY, *supra* note 338.

Conan, the trademark owner of CONAN THE BARBARIAN, and Mattel, its licensee, sued each other under civil RICO. Although each party alleged only two acts of mail or wire fraud, the district court found a nexus between the acts sufficient to permit amendment of the complaint to add RICO claims.[362]

IV. CONCLUSION

The endorsement from the Supreme Court in *Sedima* condoning expansion of civil RICO to encompass "ordinary garden variety" fraud startled many people, including federal judges and legislators. Several bills were introduced in Congress to limit the scope of civil RICO; these proposals range from a predicate act conviction requirement to a narrow definition of "pattern".[363] Several states changed their "little RICO" statutes to require a prior conviction as a condition precedent to a civil RICO suit.[364] In addition, several district courts have taken the hint of the *Sedima* court and judicially narrowed the definition of pattern by requiring multiple schemes or episodes.[365]

Both the Fifth and Seventh Circuits, however, remain steadfast in their support of RICO and have refused to narrow the statute.[366] Commentators suggest that a few minor modifications of the RICO statute will prevent abuse in the commercial

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[361] 619 F. Supp. 1167 (S.D.N.Y. 1985).

[362] *Id.* at 1170.

[363] *See* H.R. 2517, 99th Cong., 1st Sess, 131 CONG. REC. H3263 (1985)(referred to Committee on the Judiciary); H.R. 2943, 99th Cong., 1st Sess., 131 CONG. REC. H5442 (1985)(same); H.R. 3985, 99th Cong., 1st Sess. H12578 (1985)(same); S. 1521, 99th Cong., 1st Sess., 131 CONG. REC. S10285 (1985)(introduction of Civil RICO Amendments Act of 1985). Professor Blakey has criticized these Congressional attempts to limit civil RICO and argue that because of cutbacks in government enforcement in the antitrust and securities areas, private enforcement means are needed. G. Robert Blakey, *In Antitrust, Tort and RICO Reform, Obvious Goals Cover up Deep Issues*, National Law Journal, October 13, 1986, at 26 [hereinafter cited as *Goals*]; G. Robert Blakey, *RICO is Pro-Victim — Not Anti-Business*, Wall St. Journal, February 4, 1986, at 30, col. 5.

[364] In response to *Sedima*, Mississippi amended its "little RICO Act to require a prior criminal conviction of the predicate acts as a condition precedent to a civil RICO action. *See* MISS. CODE ANN. § 97-43-9(5) (Supp. 1986).

[365] *See supra* notes 108-117 and accompanying text.

[366] *See, e.g.* Ray v. Karris, 780 F.2d 636, 645 (7th Cir. 1985) R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985)(not for courts to question policies decided by Congress and upheld by the Supreme Court);(important to reemphasize commitment of court to broad and literal reading of RICO).

business arena. These statutory changes include the following: the formulation of an explicit four-year statute of limitations modeled after the antitrust statute; defining "pattern" to require proof of multiple criminal episodes and specifying that predicate acts occur within five, rather than ten years of each other; and the substitution of the word "criminal" for the perjorative word "racketeer".[367] In addition to statutory changes, commentators have urged the courts to enforce Rule 11, and to award treble attorneys' fees to parties compelled to defend frivolous RICO suits,[368] and to compel private arbitration of civil RICO claims.[369]

While most suggestions for reform appear reasonable, a serious blow to civil RICO would occur if a prior conviction were made a prerequisite to initiating a civil RICO suit. As the Supreme Court observed in *Sedima*, such a requirement would effectively eliminate the private attorney general policy which the Court found in civil RICO.[370] Since federal prosecutors are instructed to bring mail or wire fraud cases only in public interest cases and not for the benefit of private parties, a prior criminal conviction requirement would be a death blow to civil RICO.

Unless Congress statutorily limits civil RICO or the courts severely hobble RICO through the imposition of antitrust-like requirements,[371] civil RICO remains a viable additional remedy, in the proper circumstances, for intellectual property owners and, in some cases, other parties affected by the conduct of intellectual property owners. However, the attention that civil RICO has received in the wake of *Sedima* will surely heighten the attention that civil RICO claims will receive. Claimants must be prepared to defend various pre-trial motions aimed at eliminating the claim. But for truly meritorious claims, the prize at

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[367] *See supra* note 85. For a discussion of the Congressional response to *Sedima*, see Comment, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO*, 19 LOY. L.A.L. REV. 851 (1986).

[368] Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 BRIGHAM YOUNG UNIV. L. REV. 55, 92-97.

[369] *Goals*, *supra* note 363, at 28.

[370] *Sedima*, 473 U.S. at 493.

[371] *Id.* at 486-93. The guiding principle to the courts should be that under *Sedima*, antitrust jurisprudence is not to be used in resolving every issue arising under civil RICO because the underlying policies of the two statutes are different. *Id.*

the end of the "yellow brick road" — mandatory treble damages — should be worth the battles.

AUTHOR'S NOTE: The saga of civil RICO continues to unfold even as this article is being published. The Supreme Court recently agreed to review an Eighth Circuit decision construing the RICO requirement of a "pattern of racketeering activity." *See* H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3638 (U.S. March 22, 1988).

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1986 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

In 1986, the Mississippi Supreme Court rendered thirty-nine decisions in the area of administrative law. This review, however, will present only the decisions which have either expanded, clarified, or changed existing law. The most important of these decisions involve misconduct of attorneys or judges, workers' compensation, and school board disciplinary policy. The remainder of the cases encompass the following areas: municipal zoning,[1] annexation,[2] elections,[3] employment

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[1] *See* Thrash v. Mayor and Commissioners of Jackson, 498 So. 2d 801, 807 (Miss. 1986)(city may rezone upon showing of need of property for other purposes where property subject to zoning has changed so as not to be fit for its initial purpose); Broadacres, Inc. v. City of Hattiesburg, 489 So. 2d 501, 505 (Miss. 1986)(grant of petition to rezone will be affirmed unless arbitrary, capricious, confiscatory, or unsupported by evidence of change in character of neighborhood); City of Jackson v. Aldridge, 487 So. 2d 1345, 1348 (Miss. 1986)(when neither evidence of change in character of neighborhood nor existence of public need for rezoning is shown, decision denying request to rezone will not be overturned as long as not arbitrary, capricious, or confiscatory).

[2] *See* In re Inclusion into the City of Ridgeland, 494 So. 2d 348, 352 (Miss. 1986)(in determining validity of annexation petition under MISS. CODE ANN. § 21-1-45 (1972), all registered voters in area to be annexed must be ascertained as of filing date of petition; then it must be determined whether two-thirds of that number signed petition); In re Extension of Boundaries of Moss Point v. Sherman, 492 So. 2d 289, 290 (Miss. 1986)(proposed annexations, when contested, are reviewed under criteria set forth in City of Jackson v. City of Ridgeland, 338 So. 2d 152 (Miss. 1980)).

[3] *See* City of Clinton v. Smith, 493 So. 2d 331, 341 (Miss. 1986)(insufficient petitions may be supplemented when no deadline for filing, when governing board has not ruled petitions insufficient; signatures must appear on pages indicating purpose of petition); Brandon v. City of Hattiesburg, 493 So. 2d 324, 324 (Miss. 1986)(by private act, legislature may authorize city to issue bonds without referendum election usually required by state law).

policies (by municipalities and school boards),[4] and actions of various administrative bodies.[5]

I. Misconduct of Attorneys and Judges

In a case noteworthy for all attorneys, *Brumfield v. Mississippi State Bar Association*,[6] the court held that even though an attorney is not acting within his professional capacity, conduct which adversely reflects upon his ability to fulfill the obligations of the legal profession is subject to discipline.[7] H. Alva Brumfield, an attorney, had not been acting within his professional capacity toward his aunts, but the court found that he had been in a fiduciary relationship with his aunts and had defrauded them, and directed him to repay them.[8] The Mississippi State Bar filed a complaint charging Brumfield with violation of Disci-

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[4] *See* Claiborne County Board of Education v. Martin, 500 So. 2d 981, 985 (Miss. 1986)(school employee has right to engage in constitutionally protected activity without fear of adverse effect upon his employment); Merchant v. Board of Trustees, 492 So. 2d 959, 964 (Miss. 1986)(acts of insubordination, incompetence, neglect of duty by school district employee should be evaluated in context of employee's prior, continuing course of conduct); Everett v. Board of Trustees, 492 So. 2d 277, 282 (Miss. 1986)(termination of employee before board of trustees met for hearing was merely harmless procedural error); Robinson v. Utilities Comm'n of Columbus, 487 So. 2d 827, 829 (Miss. 1986)(city utility commission is not "municipal authority" within Miss. Code Ann. § 11-51-75 (1972); appeal taken later than ten days from date of commission's decision is not within that section, and thus will be allowed); Noxubee County School Bd. v. Cannon, 485 So. 2d 302, 304 (Miss. 1986)(school board must take affirmative action to give notice of non-renewal of teacher contracts; board may not sit by, deem offer lapsed if teacher fails to execute contract before deadline).

[5] *See* Harris v. Mississippi Real Estate Comm'n, 500 So. 2d 958, 963 (Miss. 1986)(finding of administrative agency will not be overturned if based upon substantial evidence, if neither arbitrary, capricious, unreasonable, nor abuse of discretion);Warren County v. Culkin, 497 So. 2d 433, 438 (Miss. 1986)(board of supervisors has authority to obtain group life, medical, accident insurance for county employees, including employees or deputy clerks of the county's chancery, circuit clerks, to pay the premiums out of general county funds); Grand Gulf Military Monument Comm'n v. Cox, 492 So. 2d 287, 287 (Miss. 1986)(appeals from Employee Appeals Board under Miss. Code Ann. §§ 11-51-95, 11-51-53, and 25-9-131(2) (1986) require posting of appeal bond; circuit court has no jurisdiction otherwise); New South Communications, Inc. v. Answer Iowa, Inc., 490 So. 2d 1225, 1227 (Miss. 1986)(administrative bodies not bound by strict rules of evidence); State *ex rel* Pair v. Burroughs, 487 So. 2d 220, 227 (Miss. 1986)(member of hospital board appointed under Miss. Code Ann. § 41-13-29(3)(c) (1986), as local; private legislation is unconstitutional when applied to creation of public office, when in conflict with Mississippi Constitution).

[6] 497 So. 2d 800 (Miss. 1986).

[7] *Id.* at 807.

[8] *Id.* at 808.

plinary Rules 1-102(A)(1, 4 and 6), involving dishonesty, fraud, deceit, or misrepresentation, or other conduct adversely affecting his fitness to practice law.[9] Although the Complaint Tribunal had suspended him from the practice of law for ninety days,[10] the Mississippi Supreme Court permanently disbarred Brumfield,[11] stating that an attorney should be disciplined for misconduct outside of his professional capacity only if the conduct is serious and if it shows that he is unfit to practice law, criteria which Brumfield's actions satisfied.[12]

In *Mississippi State Bar v. Nixon*,[13] a case involving judicial misconduct,[14] the Mississippi Supreme Court suspended the license to practice law of Walter L. Nixon, Chief Judge of the Southern District of Mississippi.[15] The court stated that the presentation of a certified copy of Nixon's conviction of perjury was conclusive evidence that fel-

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[9] *Id.* at 804.

[10] *Id.* at 806. The tribunal found that a confidential or fiduciary relationship existed between Brumfield and his aunts; while there was no attorney-client relationship, he was still under an obligation neither to defraud the ladies nor to be dishonest. *Id.*

[11] *Id.* at 808. The court emphasized that integrity and honesty are the hallmarks of an attorney and that Brumfield's dishonesty and deceit, as well as his "dismaying absence of contrition" made his misconduct worthy of disbarment. *Id.*

[12] *Id.*; *see* Rhodes v. Rhodes, 420 So. 2d 761 (Miss. 1982) (court cited Levi v. Mississippi State Bar, 436 So. 2d 781, 786 (Miss. 1983), for proposition that disciplinary rules were adopted to maintain the "highest standards of professional conduct by the members of the Bar in all facets of their professional life"); *see also* Hawaii Supreme Court v. Bergan, 592 P.2d 814, 818 (Hawaii 1979)(court's duty to regulate practice of law and to maintain integrity of legal profession); In re Goldman, 588 P.2d 964, 978 (Mont. 1978)(acts committed by attorney, contrary to highest standards of honesty, . . . "whether committed in his capacity as attorney, or otherwise, may constitute cause for discipline.").

[13] 494 So. 2d 1388 (Miss. 1986).

[14] Other cases involving misconduct of attorneys or judges include: Williams v. Mississippi State Bar, 492 So. 2d 578, 580 (Miss. 1986)(disbarred attorney will be reinstated to practice law when he has fulfilled requirements for reinstatement and when ends of justice are served); Mississippi State Bar Ass'n v. Strickland, 492 So. 2d 567, 572-73 (Miss. 1986)(where attorney converts to his personal use proceeds of judgment awarded to his clients, attempts to deceive both chancery court, complaint tribunal with forged memorandum regarding fee agreement, continues to practice law after conditional suspension, such misconduct merits suspension from practice of law for three years); Attorney K v. Mississippi State Bar Ass'n, 491 So. 2d 220, 222 (Miss. 1986)(denial of due process occurs when attorney involved in disciplinary proceedings is denied access to critical witnesses in disciplinary hearings); In re Stewart, 490 So. 2d 882, 885 (Miss. 1986)(justice court judge's conversion of public money to personal use held willful misconduct worthy of removal from office); Mississippi State Bar Ass'n v. A Mississippi Attorney, 489 So. 2d 1081, 1085 (Miss. 1986)(private reprimand of attorney who charged excessive fee held sufficient for disciplinary purposes).

[15] *Nixon*, 494 So. 2d at 1391.

ony under Rule 6(a) of the Rules of Discipline had been committed.[16] The court further held that its inherent and exclusive jurisdiction was not preempted by Articles I and III of the United States Constitution, as Nixon argued, because the court's action was limited to the license to practice law issued by the State of Mississippi.[17] In addition, the court stated that the prohibition on the practice of law by federal judges did not prevent the suspension of Nixon's license to practice law in Mississippi, for the very fact that one holds such a license "is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, ..."[18] Finally, the court affirmed the use of the summary procedure under Rule 6 which dispenses with hearings before a complaint tribunal;[19] the question of fact which would have been determined by a complaint tribunal had already been conclusively stated by the conviction in federal court.[20]

II. Workers' Compensation

In *Road Maintenance Supply v. Maxwell*,[21] the court clarified the use of the "found dead" presumption in workers' compensation cases.[22]

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[16] *Id.* at 1389. Nixon was convicted of two counts of perjury in violation of 18 U.S.C. § 1623 (1984); under Rule 6(a) of the Rules of Discipline, an attorney convicted in any federal court of any felony or "of any misdemeanor involving fraud, dishonesty, misrepresentation, [or] deceit . . ." shall be suspended from the practice of law. *Nixon*, 494 So. 2d at 1389; further, the Mississippi Supreme Court refused to look behind the district court's judgment of conviction, relying upon both Rule 6(a) and "elementary notions of full faith and credit" in accepting the judgment. *Id.* at 1389; *see* Mississippi State Bar v. Phillips, 385 So. 2d 943, 945-46 (Miss. 1980)(appropriate discipline for convicted attorney is disbarment).

[17] *Nixon*, 494 So. 2d at 1389.

[18] *Id.* at 1390 (quoting the first sentence of the Rules of Discipline). The court emphasized that most of our sister states take a similar view that persons licensed to practice, even though they may hold judicial office, are subject to bar disciplinary procedures regarding those licenses. *Id.*; *see, e.g.*, In re Alonzo, 223 So. 2d 585, 592 (Ala. 1969)(judicial office does not protect attorney from disbarment proceedings); Matter of Riley, 691 P.2d 695, 698-99 (Ariz. 1984)(judge who violated Code of Professional Responsibility is still lawyer, is amenable to discipline); Gordon v. Clinkscales, 215 Ga. 843, 114 S.E.2d 15, 18-19 (1960)(judge's license to practice law cancelled for same conduct that is cause for disbarment of any attorney).

[19] *Nixon*, 494 So. 2d at 1390.

[20] *Id.* The court reiterated that its only remaining duty was merely to ascertain and apply the law to the uncontradicted facts. *Id.*; *see* Holmes v. Mississippi State Bar, 498 So. 2d 837, 841 (Miss. 1986)(judgement of conviction is conclusive evidence thereof; such proceedings are governed by Rule 6 instead of Rule 8).

[21] 493 So. 2d 318 (Miss. 1986).

[22] *Id.* at 319. The "found dead" presumption is used in two factual contexts: first, when the decedent is "on the job" at the time of death; second, when there is a causal

At present, when a worker dies on the job, where his employment requires him to be, the law presumes — rebuttably, however — that his death resulted either partly or wholly out of and in the course of his employment.[23] In the instant case, Maxwell, a truck driver on the Tennessee-Tombigbee Waterway Project, was on the job when he fell; he was pronounced dead on arrival at the local hospital.[24] The Mississippi Workers' Compensation Commission, adopting the opinion of the administrative law judge, relied upon the "found dead" presumption and awarded full death benefits to Maxwell's widow and children, even though Maxwell had a medical history of heart trouble.[25] The Mississippi Supreme Court affirmed the use of the "found dead" presumption[26] and award of benefits[27] because the employer failed to prove that Maxwell's work activities did not contribute to his death.[28] However,

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connection between the decedent's work activities and his death. *Id.* at 320; *see* McCarley v. Iuka Shirt Co., 258 So. 2d 421, 422 (Miss. 1972)(presumption of causal connection between work activities, death when employee dies while about his employment); Murphy v. Jac-See Packing Co., 208 So. 2d 773, 776-77 (Miss. 1986)(death in company car held within course of employment even though decedent stopped by bar en route from having car serviced); Mississippi State Univ. v. Dependents of Hattaway, 191 So. 2d 418, 419-20 (Miss. 1986)(onset of decedent's illness while engaged in work activities raises presumption of causal connection); Watson v. National Burial Ass'n, 234 Miss. 749, 107 So. 2d 739, 743 (1958)(employee shot, killed in employer's vehicle during working hours was "in scope of employment").

[23] *Road Maintenance*, 493 So. 2d at 320. *See* Washington v. Greenville Mfg. & Mach. Works, 223 So. 2d 642, 645 (Miss. 1969)(explanation of "found dead" presumption); V. DUNN, WORKMEN'S COMPENSATION: A COMPREHENSIVE TREATISE ON THE WORKMEN'S COMPENSATION LAW IN MISSISSIPPI § 269 (3d ed. 1982)(discussion of application of presumption to issue of "causal connection" as well as to issue of "course of employment").

[24] *Road Maintenance*, 493 So. 2d at 319. Two nearby coworkers saw no apparent reason for Maxwell's fall. *Id.*

[25] *Id.* at 320. Maxwell's personal physician testified that Maxwell had a history of heart trouble dating back at least five years before his death and that he had been taking medication for at least a year. *Id.* at 319.

[26] *Id.* at 323. The court stated that the presumption does not disappear as long as the evidence presented tends to prove that the death was in the course of employment and at least partially causally connected to that employment. *Id.* at 321.

[27] *Id.* at 322.

[28] *Id.* at 321. The presumption would disappear if the employer could meet the burden of proving that the employee's work did not contribute to his heart attack. *Id.* The court found the case indistinguishable from Washington v. Greenville Mfg. & Mach. Works, 223 So. 2d 642 (Miss. 1969), in which the deceased's personal physician testified as to the decedent's cardiovascular disease after the worker died on the job. Even though the physician stated that in his opinion the death was not work-related, the court found the physician's opinion was too speculative to overcome the "found dead" presumption. *Washington*, 223 So. 2d at 644-45.

the court reversed the Commission's failure to apportion benefits due to the uncontradicted evidence that Maxwell had a preexisting heart condition, a factor contributing to his death.[29] The court remanded the case to the circuit court and ultimately to the Mississippi Workers' Compensation Commission for apportionment of benefits.[30]

The Mississippi Supreme Court relied upon the holding of *Road Maintenance* and expanded it in *Chapman v. Hanson Scale Co.*,[31] again holding an injury to be compensable even though it was partially caused by a preexisting medical condition.[32] Larry Chapman fell while on the job, struck his head on a concrete floor, and died. Although the pathologist testified that the cause of death was a blow to the head,[33] a neurosurgeon who had been treating Chapman testified to his history of grand mal seizures and to his taking medication for that condition.[34] The court, in finding the claim to be compensable, explained that the

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[29] *Road Maintenance*, 493 So. 2d at 323. The court relied upon MISS. CODE ANN. § 71-3-7 (1972), which allows for the apportionment of benefits where there is a preexisting physical handicap, disease, or lesion, and upon Delta Drilling Co. v. Cannette, 489 So. 2d 1378 (Miss. 1986)(factors employer must establish for apportionment of benefits). *Road Maintenance*, 493 So. 2d at 323.

[30] *Road Maintenance*, 493 So. 2d at 323. For cases discussing apportionment of workers' compensation benefits, see infra note 38 and Leake County Cooperative (A.A.L.) v. Dependents of Barrett, 226 So. 2d 608, 614 (Miss. 1969).

[31] 495 So. 2d 1357 (Miss. 1986). The court relied upon *Road Maintenance* to the extent that a claim is compensable if the injury or death is in part work-connected. *Id.* at 1359. The court did not need, however, to resort to the "found dead" presumption since a co-worker saw Chapman fall and strike his head. *Id.* at 1359.

[32] *Id.* at 1361. The court stated simply that even though Chapman suffered from epilepsy, since Chapman fell and struck his head while at his usual place of work and died as a result, then his death arose out of and within the course and scope of his employment. *Id.* at 1361; *see* MISS. CODE ANN. § 71-3-7 (1972)(liability exists for injury arising out of course of employment).

[33] *Chapman*, 495 So. 2d at 1359. The pathologist certified that cause of death was "cerebral contusion, concussion and edema due to blunt trauma to forehead." *Id.*

[34] *Id.* Although the doctor had prescribed dilantin to control Chapman's seizures, the autopsy revealed him to be drug-free, suggesting that he had not been taking the medication. *Id.* The court continued that a familar concept in workers' compensation law is that the employer takes the worker as the worker is found — with all his attendant strengths and weaknesses. *See* Allen v. Metro Contract Serv., Inc., 421 So. 2d 1289, 1291 (Ala. App. 1982)(employer must take "employee as he finds him [,] with any existing infirmities"); Fox v. Alascom, Inc., 718 P.2d 977, 982 (Alaska 1986)(workers' compensation act to be liberally construed; employer must take worker as he finds him); Salt River Project v. Industrial Comm'n of Arizona, 128 Ariz. 541, 544, 627 P.2d 692, 695 (1981)(fundamental tenet of workers' compensation law is that employer takes worker with existing infirmities). Therefore, whether Chapman's death arose out of and in the course of employment should be decided by the same criteria as that of a worker without a history of seizures such as those suffered by Chapman. *Chapman*, 495 So. 2d at 1359.

floor of one's workplace is no different from a movable piece of equipment; a collision with either would be compensable.[35] The court concluded that both the concrete floor and the grand mal seizure worked together to cause Chapman's death,[36] adding that exposure to falls upon a concrete floor in the workplace is a sufficient risk that an injury caused in part thereby is a compensable one.[37] The court considered *Chapman* an appropriate case for apportionment since a preexisting condition materially contributed to the injury.[38] Decisions such as *Road Maintenance* and *Chapman* may, in their attempt to favor the common worker, intensify the problem many workers face already: discrimination on the basis of a handicap or preexisting condition or disease. When employers are forced by this caselaw to turn away risky applicants in order to control exposure or comply with their insurer's demands, these decisions will seem short-sighted indeed.

In another case attempting to clarify existing law, *White v. Malone Properties, Inc.*,[39] the court left undisturbed the "choice of law" principles established long ago.[40] However, the case should have been

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[35] *Chapman*, 495 So. 2d at 1360. A collision with either a concrete floor or a piece of movable equipment is an encounter with an appurtenance of the workplace or with a risk of employment, either of which could contribute to injury or death; as a matter of law, both arise out of and in the course of employment. *See* Cooper's Inc. of Mississippi v. Long, 224 So. 2d 866, 868-69 (Miss. 1969)(collision with movable piece of equipment held compensable); *see also* George v. Great Eastern Food Products, Inc., 44 N.J. 44, 46-49, 207 A.2d 161, 162-63 (1965)(employee's fatal skull fracture resulting from idiopathic fall in which his head struck concrete floor of workplace held compensable).

[36] *Chapman*, 495 So. 2d at 1360. *See* Aetna Finance Co. v. Bourgoin, 252 Miss. 852, 174 So. 2d 495, 498 (1965)(epileptic seizure, risk of travel arising from employment concurred to cause injury).

[37] *Chapman*, 495 So. 2d at 1361.

[38] *Id.*; *see* Road Maintenance Supply, Inc. v. Dependents of Maxwell, 493 So. 2d 318, 323 (Miss. 1986)(preexisting heart condition sufficient cause to apportion benefits); Delta Drilling Co. v. Cannette, 489 So. 2d 1378, 1381 (Miss. 1986)(criteria for apportionment of benefits); Alexander v. Campbell Constr. Co., 288 So. 2d 4, 8 (Miss. 1974)(history of hypertensive vascular disease called for apportionment of benefits); Washington v. Greenville Mfg. & Mach. Works, 223 So. 2d 642, 647 (Miss. 1969)(evidence insufficient to overcome presumption of causal connection between decedent's death, his work activities; apportionment of benefits appropriate).

[39] 494 So. 2d 576 (Miss. 1986).

[40] *Id.* at 578. The court reiterated its holdings in L. & A. Constr. Co. v. McCharen, 198 So. 2d 240, 243-44 (Miss. 1967) and Bethlehem Steel v. Payne, 183 So. 2d 912, 916 (Miss. 1966), stating that a resident of Mississippi, employed and injured in another state, must file his claim for benefit under the workers' compensation laws of the state where the injury occurred. In *L.& A. Constr.*, the court quoted the choice of law rule stated in RESTATEMENT OF CONFLICT LAWS § 400 (1934); "No recovery can be had under the Workmen's Compensation Act of a state if neither the harm occurred nor the con-

decided upon the more current "center of gravity" test.[41] In this workers' compensation case, Jeffrey White was living in Louisiana and working for Malone, a Mississippi corporation, when he was injured.[42] Although Malone was insured for workers' compensation claims when the injury occurred, no claim was ever filed in Louisiana for the injury.[43] After the time to apply for benefits under the Louisiana statute had expired, White filed suit in Mississippi. The circuit judge sustained a motion for summary judgment in favor of Malone. The Mississippi Supreme Court stated that the findings of the circuit judge were "amply supported by the evidence,"[44] and that the only question to be addressed was that of Louisiana's Workers' Compensation Act.[45] Relying upon *Bethlehem Steel Co. v. Payne*,[46] the court stated that the Louisiana statute created both the right to benefit and the remedy, as well as a specific time within which to apply for those benefits. After the time allotted to apply for benefits had expired, the right to such benefits became extinct, not only in the state which created the right, but everywhere else as well.[47]

Although the court stated that it had been unable to find where the "center of gravity"[48] (or "most substantial relationship") test had been applied to workers' compensation cases, it did state that Louisiana had the most substantial relationship to the action alleged in this cause and that the laws of that state must, therefore, be applied.[49]

The result in this case would be the same whether the court used the older "choice of law" cases or the "center of gravity" principles;

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tract of employment was made in the state." *L&A Constr.*, 198 So. 2d at 243.

[41] *White*, 494 So. 2d at 579 (Robertson, J., concurring). Justice Robertson compared the majority's reliance upon *Bethlehem Steel* and *L. & A. Construction* to a federal court's relying upon pre-*Erie* precedents in a 1986 diversity case. *Id.*

[42] *White*, 494 So. 2d at 577.

[43] *Id.* at 577. Malone was insured by Fireman's Fund Insurance Company for the period of September 1, 1976, to September 1, 1977; Fireman's Fund paid various workers' compensation claims for Malone during that period. *Id.*

[44] *Id.* The evidence consisted of depositions and affidavits. *Id.*

[45] *Id.*

[46] 183 So. 2d 912 (Miss. 1966).

[47] *White*, 494 So. 2d at 578, *citing* Louisville & N.R. Co. v. Dixon, 168 Miss. 14, 150 So. 811 (1933). Therefore, by not applying for benefits in Louisiana before the time to do so expired, White lost his right to apply for them in Mississippi as well. *White*, 494 So. 2d at 578.

[48] *White*, 494 So. 2d at 578. The "center of gravity" rule was first recognized by the Mississippi Supreme Court in Mitchell v. Craft, 211 So. 2d 509, 512 (Miss. 1968).

[49] *White*, 494 So. 2d at 578. The court concluded by stating that Louisiana had provided the plaintiff an exclusive remedy and that the Mississippi courts could not correct his error in not pursuing that remedy. *Id.*

therefore, it would seem logical merely to use the more current "center of gravity" premise, since it has been employed in every "choice of law" case to come before the Mississippi Supreme Court since 1869.[50] "It would seem on principle that if an action is time barred in the state which furnishes the center of gravity, it should be held time barred everywhere."[51]

Another case which helped to clarify the state of workers' compensation law in Mississippi was *Wilson v. Service Broadcasters, Inc.*[52] In *Wilson*, the Mississippi Supreme Court carefully explained the limits of the "going and coming" rule[53] and held unconstitutional the prior, unamended version of section 71-3-25 of the Mississippi Code[54] The decedent in *Wilson* had been killed on the way to the television station where she worked. Her husband and child filed for benefits under the Workers' Compensation Act. The Mississippi Supreme Court held the claim to be valid, stating that Mrs. Wilson's death arose out of the scope of her employment[55] and that Mr. Wilson should not have to prove his dependency in order to collect benefits.[56]

In a rather confusing opinion, *Benoit Elevator Co. v. Mitchell*,[57]

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[50] *Id.* at 580 (Robertson, J., concurring); *see* Fells v. Bowman, 274 So. 2d 109, 112-13 (Miss. 1973)(application of "center of gravity" rule); Craig v. Columbus Compress & Warehouse Co., 210 So. 2d 645 (Miss. 1968)(adoption of "center of gravity" rule).

[51] *White*, 494 So. 2d at 579-80 (Robertson, J., concurring).

[52] 483 So. 2d 1339 (Miss. 1986).

[53] *Id.* at 1341-42. Generally, hazards encountered by an employee off the premises of the employer, when going to or returning from work, are not compensable, as they are not incident to employment and do not arise therefrom. *Id.* at 1341. For cases construing the "going and coming" rule, see Stepney v. Ingalls Shipbldg. Div., Litton Systems, Inc., 416 So. 2d 963 (Miss. 1982) and Aetna Finance Co. v. Bourgoin, 252 Miss. 852, 174 So. 2d 495 (1965).

For an accident either going to or returning from work to be compensable, the employee must prove that the travel was work-related, as detailed in Dr. Pepper Bottling Co. v. Chandler, 224 Miss. 256, 260, 79 So. 2d 825, 826 (1955). For example, he might show that the employer had furnished the transportation, had renumerated the employee for the travel, or that the employee had performed some of his work at home. *Dr. Pepper Bottling Co.*, 79 So. 2d at 826.

[54] *Wilson*, 483 So. 2d at 1344. Prior to 1984, MISS. CODE ANN. § 71-3-25 (1972), allowed a widow, but not a widower, to collect an immediate lump-sum death benefit of $250; it also presumed a widow to be dependent but required a widower to prove dependency. *Wilson*, 483 So. 2d at 1343.

[55] *Wilson*, 483 So. 2d at 1342. Mrs. Wilson had worked at home on a story on the morning of her death. *Id.*

[56] *Id.* at 1344. The court relied upon Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), in which the United States Supreme Court held a similar Missouri statute unconstitutional. *Wilson*, 483 So. 2d at 1344.

[57] 485 So. 2d 1068 (Miss. 1986).

the Mississippi Supreme Court attempted to promulgate a rule regarding the effects of lingering injuries by stating that the statute of limitations begins to run in workers' compensation cases when the claimant knows or should know of the injury.[58] In *Benoit*, a work-related injury to Mitchell's fingers in 1959 had required surgery; he was paid both workers' compensation benefits and disability income. Mitchell continued to have problems with his fingers and, in 1975, he required further surgery for the condition,[59] which physicians attributed to the 1959 injury. The Mississippi Supreme Court denied benefits for the 1975 surgery,[60] but the basis for the denial was unclear. The court discussed neither the one-year statute of limitations[61] nor the two-year statute.[62] However, a better position would have been to rely upon section 71-3-15 of the Mississippi Code, which promises benefits "for as long as the nature of the injury or the process of recovery may require."[63] Since the one-year statute of limitations begins to run when the request for benefits is filed,[64] and the two-year statute begins running when the worker should be aware of a work-related injury,[65] it is obvious that Mitchell would have received benefits if he had received a new injury rather than suffering the lingering effects of an old one.[66] The result in *Benoit* seems harsh indeed in the light of *Gibbs v. Bass*,[67] where the court assured the worker that the statute of limitations would be tolled as long as the "nature of the injury or the process of recovery may require."[68]

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[58] *Id.* at 1069.

[59] *Id.* Mitchell admitted to having recurring pain throughout the intervening years, as well as having problems with the function of the finger, but he had not sought medical attention until the pain became so severe and the finger so inflexible that he could neither sleep nor work. *Id.*

[60] *Id.* at 1070.

[61] MISS. CODE ANN. § 71-3-53 (1972).

[62] *Id.* at § 71-3-35. The only case law cited refers to the two-year statute. *See* Bradley, 2 *Workers' Compensation Outlook* 2 (Sept. 1986).

[63] MISS. CODE ANN. § 71-3-15 (1972).

[64] *Id.* at § 71-3-53; *see* Bradley, *supra* note 62 at 2.

[65] MISS. CODE ANN. § 71-3-35 (1972).

[66] Bradley, *supra* note 62, at 2. *See* Shainberg's Black and White Store v. Prothro, 118 So. 2d 862 (Miss. 1960)(recurrence of injury within statutory time period sufficient for additional benefits). *But see* Barr v. Conoco Chemicals, Inc., 412 So. 2d 1193, 1196 (Miss. 1982)(claim filed more than one year after last treatment or payment of benefits barred by statute of limitations); Trehern v. Grafe Auto Co., 232 Miss. 855, 859-60, 100 So. 2d 786, 787 (Miss. 1958)(claim for additional benefits filed almost four years after last payment of benefits barred by statute of limitations).

[67] 237 Miss. 823, 116 So. 2d 542 (1959).

[68] *Id.* at 544; *see* City of Kosciusko v. Graham, 419 So. 2d 1005 (Miss. 1982)(medical

Two other 1986 workers' compensation cases were notable.[69] First, in *Sonford Products Corporation v. Freels*,[70] the Mississippi Supreme Court held that in cases requiring expert proof of causal connection between injury and death, it is not necessary for the expert to be a medical doctor; the expert must simply be qualified by knowledge, skill, experience, training, or education[71] to testify as to the cause of death. Second, in *M&J Oil Co. v. Wilson*,[72] the court held that the ten

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service claim granted several years after injury); International Paper Co. v. Evans, 293 So. 2d 12 (Miss. 1974)(claim granted for medical services many years after injury).

[69] Other workers' compensation decisions handed down this year were: Leathers v. Aetna Casualty & Surety Co., 500 So. 2d 451, 452-53 (Miss. 1986)(action for intentional tort and bad faith refusal to pay may be maintained against employer as well as insurance carrier in workers' compensation claim); Marshall Durbin, Inc. v. Hall, 490 So. 2d 877, 881 (Miss. 1986)(preexisting medical condition which was not occupationally disabling is not ground for apportionment of Workers' Compensation benefits); Delta Drilling Co. v. Cannette, 489 So. 2d 1378, 1380, 1381 (Miss. 1986)(authority of commission to reopen case; apportionment of benefits); Penrod Drilling Co. v. Etheridge, 487 So. 2d 1330, 1334 (Miss. 1986)(same); Adams v. Petal Mun. Sep. School Systems, 487 So. 2d 1329, 1330 (Miss. 1986)(legislative exemption permitting workers' compensation coverage for school systems to be discretionary (not mandatory) is not unconstitutional, has rational basis); Emerson Electric Co. v. McClarty, 487 So. 2d 228, 232 (Miss. 1986)(in absence of proven willful misrepresentation, MISS. CODE ANN. § 71-3-7 (1972) provides no remedy except apportionment of benefits); Georgia-Pacific v. Veal, 484 So. 2d 1025, 1027 (Miss. 1986)(if decisions of Mississippi Workmen's Compensation Commission are based on substantial evidence, supreme court will not disturb those findings of fact); McCain v. Northwestern Nat'l Ins. Co., 484 So. 2d 1001, 1002 (Miss. 1986)(exclusivity provisions of Workmen's Compensation act do not bar action by injured employee against insurance carrier for intentional torts); Hudson v. Keystone Seneca Wire Cloth Co., 482 So. 2d 226, 227 (Miss. 1986)(claimant seeking workers' compensation benefits must show by post-accident conduct that injury is work-related); Foster v. J & S Enterprises, 481 So. 2d 857, 858 (Miss. 1986)(when seeking workers' compensation benefits, partner in business must have elected to take such coverage under MISS. CODE ANN. § 71-3-79 (1972)).

[70] 495 So. 2d 468 (Miss. 1986).

[71] *Id.* at 472; *see* Hall v. Hilbun, 466 So. 2d 856, 873-74 (Miss. 1985)(qualifications of expert witnesses); House v. State, 445 So. 2d 815, 822 (Miss. 1984)(hypnotist's testimony not possessed of requisite degree of validity generally demanded of expert witnesses).

In the instant case, the decedent's survivors claimed that his death was caused by exposure to toxic chemicals; the expert witness was a toxicologist (one who deals with poisons and their effect on living organisms) who testified as to the causal relationship between the decedent's employment and his fatal illness. *Sonford Products*, 495 So. 2d at 472. *See* DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 281 (3d ed. 1982)(both lay and medical testimony must receive liberal interpretation in workers' compensation cases); L.B. Priester & Son, Inc. v. Dependents of Bynum, 244 Miss. 185, 142 So. 2d 30 (1962)(same); *see also* Backes v. Valspar Corp., 783 F.2d 77 (7th Cir. 1986)(chemist competent to testify as to plaintiff's medical problems being caused by chemically contaminated water).

[72] 498 So. 2d 344 (Miss. 1986).

percent statutory penalty for nonpayment of benefits (payable without an award) within fourteen days[73] must be requested when the case is before the Workers' Compensation Commission, or else the right to that penalty will be waived.[74]

III. School Board Disciplinary Policy

In an opinion that should serve as a guide to all school boards, the Mississippi Supreme Court left no doubt that due process must be accorded those who have allegedly broken school rules. In *Warren County Board of Education v. Wilkinson*,[75] the Warren County Board of Education decided that Renee Wilkinson should lose all credit for the second semester of work when the principal discovered that she had taken two or three sips of beer at home before coming to school.[76] The school board decided to give the maximum punishment,[77] even though the student handbook stated that such a severe punishment would be given only for the commission of a Type IV offense, such as possession of alcohol or drugs while going to or from school, on school property, at school-sponsored activities, or on school-sponsored trips.[78]

In its strongly-worded opinion, the court held that before Renee could be rightfully punished for her conduct, that conduct had to have been forbidden; "[i]t is elementary that it is a violation of due process to punish one for conduct that has not been lawfully condemned."[79] The court stated that since there was no school rule prohibiting a student's drinking beer at home, then Renee had not broken the rule concerning the use of alcohol and drugs as set out in the student handbook.[80]

In addition, Renee's father had asked the school board to have present at the hearing the witnesses against her, but these teachers

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[73] Miss. Code Ann. § 71-3-37(5) (1972).

[74] *M & J Oil Co.*, 498 So. 2d at 345. *See* New & Hughes Drilling Co. v. Smith, 219 So. 2d 657 (Miss. 1969)(request for statutory penalty not timely made waives right thereto).

[75] 500 So. 2d 455 (Miss. 1986)(hereinafter cited as *Wilkinson*).

[76] *Id.* at 455-56. The day of the incident was the last day of school for the year, and Renee was exempt from examinations due to her good grades, perfect attendance, and good deportment. *Id.* at 457. Renee neither drank the beer at school nor caused any disturbance, yet the board gave her the most severe punishment available. *Id.* at 459.

[77] *Id.* Prior to the hearing, the superintendent told Renee's father that "she was going to be punished." *Id.* at 459.

[78] *Id.* at 458. Renee had sipped the beer at home *before* going to school. *Id.* at 457.

[79] *Id.* at 460; *see* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969)(rules must exist before they may be used to regulate human conduct).

[80] *Wilkinson*, 500 So. 2d at 460.

were not present at the hearing.[81] The Mississippi Supreme Court first emphasized that a student's interest in obtaining an education has long been given substantive and procedural due process protection;[82] the court continued by stating emphatically that the Warren County School Board, by punishing Renee while simultaneously denying her an opportunity to confront her accuser,[83] had deprived the student of her due process rights under the fourteenth amendment of the United States Constitution.[84]

Dianne S. Riley

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[81] *Id.* at 456. The school principal removed Renee from class and got her to admit that she and her friend had tasted the beer at home before school. Other teachers had spoken to Renee's friend, who had made a statement concerning the beer. The principal stated that Renee had been nervous when he questioned her. *Id.*

[82] *Id.* at 458; *see, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982)(statute denying education to children of illegal aliens held invalid); Bolling v. Sharpe, 347 U.S. 497, 500 (1954)(federal segregation of public schools is denial of due process); Pierce v. Society of Sisters, 268 U.S. 510 (1925)(right of parents to send children to private schools).

[83] *Wilkinson*, 500 So. 2d at 460. The school board had not followed its own procedure for notice and hearing which provided explicitly for the accused student to have "the right to confront and cross-examine witnesses against him . . . ." *Id.*

[84] *Id.* at 458-59; *see* Clinton Mun. Sep. School Dist. v. Byrd, 477 So. 2d 237 (Miss. 1985)(disciplinary powers of school board subject to fourteenth amendment); *see also* Tinker v. Des Moines Community School Dist., 393 U.S. 503, 507 (1969)(same); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 524, 637 (1943)(same).

The court concluded that if the failure to allow Renee to confront her accusers was insufficient for a violation of her constitutional rights, then the severity of the punishment would constitute cruel and unusual punishment under the eighth amendment. Renee was given the most severe punishment possible for a violation that did not even occur on school property. *Wilkinson*, 500 So. 2d at 460-61.

CIVIL PROCEDURE

At the close of its 1986 term, the Mississippi Supreme Court had rendered 48 decisions which considered issues of civil procedure. This review will focus on five of those decisions which either have resolved issues of first-impression in the state or have interpreted or clarified existing law. The range of topics discussed include form of pleadings,[1] real parties in interest,[2] default judgments,[3] conditions for continuance,[4] and interlocutory appeal from the circuit court.[5]

The remaining opinions handed down by the Court in 1986 dealt with amendment of defective judgments,[6] appeal and error,[7] attorney's fees as costs of judgment,[8] choice of law,[9] directed verdicts,[10] disclosure

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[1] Gilchrist Machinery Co. v. Ross, 493 So. 2d 1288 (Miss. 1986)(failure to object within reasonable time before trial to violation of Rule 10(d) works as waiver of rule's effect).

[2] Turner v. Haynes, 489 So. 2d 494 (Miss. 1986)(insurance company which released its right to subrogation upon being reimbursed is not real party in interest).

[3] Bryant, Inc. v. Walters, 493 So. 2d 933 (Miss. 1986)(judgment is not vacated unless defendant can show meritorious defense; judgment is not void unless rendering court lacked jurisdiction or acted on pleading which stated no cause of action).

[4] Owens v. Whitwell, 481 So. 2d 1071 (Miss. 1986)(imposition of monetary conditions, as opposed to properly ordered sanctions, as consideration for continuance is improper procedure).

[5] Kilgore v. Barnes, 490 So. 2d 895 (Miss. 1986)(interlocutory appeal allowed from circuit court only in exceptional circumstances).

[6] Southern Trucking Serv., Inc. v. Mississippi Sand & Gravel, Inc., 483 So. 2d 321 (Miss. 1986)(Miss. R. Civ. P. 60 grants courts plenary power to amend defective judgments; however, defective judgment which is never corrected cannot be basis of any subsequent action and renders such subsequent action void).

[7] Vinson v. Johnson, 493 So. 2d 947 (Miss. 1986)(in absence of contrary record, supreme court will presume trial court acted properly and, if evidence was necessary, that court heard sufficient evidence to support its judgment).

[8] Hughes Equipment Co. v. Fife, 482 So. 2d 1144 (Miss. 1986)(to award costs and attorney's fees pursuant to Miss. Code Ann. § 11-53-81 (1972) and Miss. R. Civ. P. 41 and 54, must be judgment rendered in favor of party seeking fees).

[9] White v. Malone Properties, 494 So. 2d 576 (Miss. 1986)(center of gravity test inapplicable in worker's compensation case); *see* 1986 Mississippi Supreme Court Review, Administrative Law, 56 Miss. L.J. 647 (1986).

[10] Baker Service Tools, Inc. v. Buckley, 500 So. 2d 970 (Miss. 1986)(directed verdict motion should be granted only if trial judge finds plaintiff's evidence and favorable inferences flowing therefrom are not sufficient to support verdict in plaintiff's favor); Smith v. Estate of Gilbert, 498 So. 2d 823 (Miss. 1986)(even where no eyewitnesses remain and evidence is circumstantial, directed verdict is not proper if plaintiff presents sufficient evidence from which reasonable inference may support jury verdict in plaintiff's favor);

of witnesses in discovery,[11] dismissal for failure to prosecute,[12] dismissal standards,[13] evidence,[14] findings by the court,[15] judgments notwithstanding the verdict,[16] jurisdiction,[17] motions to dismiss for failure to

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Wilson v. South Cen. Miss. Farmers, Inc., 494 So. 2d 358 (Miss. 1986)(where plaintiff's evidence, testimony and favorable inferences therefrom present sufficient conflicts, jury issue exists); South Central Bell v. Parker, 491 So. 2d 212 (Miss. 1986)(though record does not reflect entrance of motion for directed verdict, if record reflects that court and attorneys were under impression that such motions were made, granting such is proper); Aron v. Panola-Quitman Grain Corp., 490 So. 2d 891 (Miss. 1986)(directed verdict improper where question of fact remains); Marsh v. Home Ins. Co., 484 So. 2d 1037 (Miss. 1986)(where reasonable jury could draw reasonable inferences from facts which would support verdict in favor of plaintiff, directed verdict in defendant's favor is error).

[11] Harris v. General Host Corp., No. 55,984 (Miss. Nov. 12, 1986)(proponent of interrogatories has procedural right to identities of expert witnesses to be called by opposing party; respondent has obligation to supplement responses so as to reasonably notify proponent).

[12] Watson v. Lillard, 493 So. 2d 1277 (Miss. 1986)(trial court may at its discretion dismiss for failure to prosecute especially where conduct creates "aggravating circumstances" which delay prosecution).

[13] Mitchell v. Rawls, 493 So. 2d 361 (Miss. 1986)(when considering dismissal motion at close of plaintiff's case, trial judge sitting without jury must view evidence fairly and use discretion in granting such motion); Croenne v. Irby, 492 So. 2d 1291 (Miss. 1986)(Rule 41(b) provides for dismissal at close of plaintiff's case where evidence does not support claim for relief).

[14] Cranmer v. Baylis, 493 So. 2d 977 (Miss. 1986)(party has right to contradict testimonial evidence and impeach witness by showing bias, motive or intent which would affect credibility of such testimony); Gilmore v. Luther McGill, Inc., 491 So. 2d 863 (Miss. 1986)(not reversible error for trial court to sustain objections to questions on cross-examination concerning traffic violation, to evidence offered to prove habit and conduct in conformity when eyewitness testimony is available, and to rebuttal testimony when it could only be properly admitted during party's case-in-chief).

[15] Rives v. Peterson, 493 So. 2d 316 (Miss. 1986)(bench findings enjoy deference accorded jury verdicts and will not be reversed unless manifestly wrong).

[16] Baker Service Tools, Inc. v. Buckley, 500 So. 2d 970 (Miss. 1986)(motion for JNOV to be granted only if the trial judge finds plaintiff's evidence and defendant's uncontradicted evidence, when considered in light most favorable to plaintiff, are such that reasonable jurors could not differ in reaching verdict contrary to jury verdict); Spradlin v. Smith, 494 So. 2d 354 (Miss. 1986)(appeal available where JNOV granted and new trial conditionally granted; JNOV to be granted only where reasonable men, considering all facts and inferences in light most favorable to non-movant would find evidence so overwhelmingly in favor of movant that they could not have reached jury's verdict).

[17] Owen and Galloway v. Travelers Ins. Co., 499 So. 2d 776 (Miss. 1986)(court in which action was pending is proper forum for issues concerning distribution of settlement proceeds, thus any other court is without jurisdiction to hear those issues); Brinnon v. Wilson, 485 So. 2d 301 (Miss. 1986)(where case has been removed to appellate court by appeal, lower court is divested of any jurisdiction to subsequently modify its order or consider rehearing); Lee v. Coahoma Opportunities, Inc., 485 So. 2d 293 (Miss. 1986)(where plaintiff presents colorable claim within subject matter jurisdiction of court,

state a claim,[18] new trials,[19] offers of judgment,[20] pre-rules procedure,[21] reinstatement of dismissed cases,[22] requests for admissions,[23] collateral estoppel,[24] statutory damages,[25] statutes of limitations,[26] standing,[27] stays,[28] summary judgments,[29] Supreme Court Rules,[30] and voluntary

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that court acquires authority to hear all proceedings regarding such claim).

[18] Owen and Galloway v. Travelers Ins. Co., 499 So. 2d 776 (Miss. 1986)(where chancellor properly dismisses but for wrong reason, his judgment will not be disturbed); Ford v. White, 495 So. 2d 494 (Miss. 1986)(12(b)(6) motion proper only where plaintiff presents no set of facts which if proven would establish right to relief).

[19] Bradley v. Findley, No. 56,531 (Miss. Nov. 5, 1986)(granting new trial will be reversed if manifestly wrong or abuse of discretion); Baker Service Tools, Inc. v. Buckley, 500 So. 2d 970 (Miss. 1986)(motion for new trial granted only if trial judge, in his discretion, sees that the verdict is contrary to substantial weight of evidence); Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc., 490 So. 2d 1210 (Miss. 1986)(new trial is within broad discretion of trial judge and will not be error unless result is miscarriage of justice).

[20] Johnson v. Stinson, 495 So. 2d 1023 (Miss. 1986)(where final judgment is more favorable than defendant's offer of judgment, plaintiff is not required to pay trial court costs incurred after such offer).

[21] Satcher v. Wiser, 483 So. 2d 694 (Miss. 1986)(complaints filed before Mississippi Rules of Civil Procedure were effective must specify with particularity acts or omission constituting negligence and must allege more than general legal conclusions).

[22] Deposit Guaranty Nat'l Bank v. Roberts, 483 So. 2d 348 (Miss. 1986)(dismissed case cannot be reinstated after expiration of term of dismissal unless dismissal was defective or involved fraud, accident or mistake; dismissal as stale precludes applicability of "saving statute").

[23] Educational Placement Servs. v. Wilson, 487 So. 2d 1316 (Miss. 1986)(failure to respond within thirty days to request for admission can result in matters being taken as admitted).

[24] Ingalls Shipbldg. v. Parson, 495 So. 2d 461 (Miss. 1986)(collateral estoppel prevents relitigation in Longshoreman's Act action of issues first resolved in Mississippi Worker's Compensation Act action).

[25] White v. Penn Mutual Life Ins. Co., 490 So. 2d 885 (Miss. 1986)(statutory damages are appropriate against unsuccessful appellant in interpleader case because judgment below meets statutory definition of judgment for "sum of money" as well as for "possession of personal property").

[26] Craft v. Price, No. 55,866 (Miss. Oct. 1, 1986)(MISS. CODE ANN. § 115-1-49 bars cause not commenced within six years of rise of cause of action); Minor v. State Dept. of Public Welfare, 486 So. 2d 1253 (Miss. 1986)(statute limiting paternity action to one year from birth of child does not apply to paternity actions brought by Department of Public Welfare).

[27] Board of Trustees v. Van Slyke, No. 55,261 (Miss. Dec. 17, 1986)(statutory right of citizens of access to public records confers standing upon citizens to seek enforcement through injunction; citizen has standing to challenge constitutionality of governmental action).

[28] Brown v. Brown, 493 So. 2d 961 (Miss. 1986)(where another state court has subject matter and *in personam* jurisdiction, it is no abuse of discretion to stay Mississippi proceeding pending other court's decisions where that court gained *in personam* jurisdic-

dismissals.[31]

Additionally, the supreme court ordered the adoption into the Mississippi Rules of Civil Procedure Rule 14[32] and amended Rule 40[33] and the comments thereto.

1. Mississippi Rules of Civil Procedure

A. *Rule 10(d): Form of Pleadings — Copy Attached*

In *Gilchrist Machinery Co. v. Ross*,[34] the supreme court confronted the problem presented by the construction of Rule 10(d). Rule 10 sets forth the form of pleadings; subsection (d) calls for necessary

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tion first).

[29] Brown v. McQuinn, 501 So. 2d 1093 (Miss. 1986)(where affidavits by plaintiff's experts list specific acts of negligence in medical malpractice suit, there exist genuine issues of material fact and summary judgment should be denied); Phillips v. Hull, 516 So. 2d 488 (Miss. 1986)(failure to present affidavits of medical experts in opposition to defendant's summary judgment motion is failure to show existence of material issue of act); Ratliff v. Ratliff, 500 So. 2d 981 (Miss. 1986)(motion for summary judgment not supported by affidavit or other sworn statements should not be sustained); Mississippi Moving & Storage Co. v. Western Elec. Co., 498 So. 2d 340 (Miss. 1986)(in granting motion for summary judgment, trial court erred in deciding contract, not bill of lading, applied on issue of damages; trial court may not try issues of fact but may only determine if such issues exist).

[30] Nelson v. Bank of Miss., 498 So. 2d 365 (Miss. 1986)(indigent's right to proceed *in forma pauperis* in civil case limited to trial court level; Miss. Sup. Ct. R. 48 does not create right to appeal *in forma pauperis*); Sweet v. Luster, 492 So. 2d 983 (Miss. 1986)(notice of appeal filed before entry of judgment is treated as filed after entry of judgment once failure to enter is corrected); Mississippi Printing Co. v. Maris, West & Baker, Inc., 492 So. 2d 977 (Miss. 1986)(under Miss. Sup. Ct. R. 11, directed verdict in favor of defendant corporate officers can be substantive error prejudicing case against corporation); Lucedale v. George County Nursing Home, Inc., 482 So. 2d 223 (Miss. 1986)(where application of Supreme Court Rule would result in inequity and unfairness, Miss. Sup. Ct. R. 33 allows court to suspend that rule's operation).

[31] Hudson v. Bank of Edwards, 495 So. 2d 1349 (Miss. 1986)(voluntary dismissal is without prejudice and as such will be upheld where there is no prejudicial effect, allowing defendant to reform pleadings, maintain counterclaim, or file new claim).

[32] Miss. R. Civ. P. 14 governs third-party practice and allows a defendant to bring into the action one who was not previously a party but who may be liable for all or part of the claim. *See* Comment, *Fair Apportionment of Fault Among Joint Tortfeasors — A Mississippi Perspective*, 55 Miss. L.J. 709, 718-20 (1985)(problems posed by absence of Rule 14 from Mississippi Rules and differences peculiar to Mississippi in proposed Rule 14).

[33] Miss. R. Civ. P. 40 sets forth requirements of method and notice in scheduling cases for trial.

[34] 493 So. 2d 1288 (Miss. 1986). The court also dealt with the construction of Rule 10(d) in Bryant, Inc. v. Walters, 493 So. 2d 933 (Miss. 1986). *See infra* text and notes 54-72.

attachment of a copy of an account or other written instrument upon which a claim or defense is founded unless the pleading states sufficient justification for nonattachment.[35]

In *Gilchrist*, Frederic Ross filed suit against Gilchrist Machinery Co. seeking payment of the balance due in legal fees arising from his representation of Gilchrist in a case involving complex litigation. On review of the evidence, the trial court disallowed part of Ross's claim, awarding a judgment of only part of the balance sought.[36]

On appeal, Gilchrist contended that the trial court erred in admitting a series of invoices which Ross submitted as evidence of the amount due since those invoices were not attached to the pleadings as required by Mississippi Rule of Civil Procedure 10(d).[37] The court held that the effect of Rule 10(d) is not exclusionary but that where a plaintiff fails to conform to it, the defendant may file a proper motion or otherwise seek compliance reasonably in advance of trial and with failure of such compliance, the defendant may be entitled to dismissal without prejudice.[38] The court stated that a failure to assert a violation of Rule 10(d) by proper motion or otherwise reasonably in advance of trial will operate as a waiver of the rights provided by the rule.[39] Therefore, since Gilchrist did not object to a violation of the rule until Ross presented the invoices at trial, the Court denied an assignment of error on that point.[40]

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[35] MISS. R. CIV. P. 10(d). This subsection is unique as it does not appear in Federal Rule 10. The comment to Mississippi's Rule 10 states that subsection (d) "was added to continue the traditional Mississippi practice of annexing to pleadings copies of written documents upon which the claim or defense is founded." Thus federal law provides no interpretive guidance to 10(d). *Gilchrist*, 493 So. 2d at 1291.

[36] *Gilchrist*, 493 So. 2d at 1290.

[37] *Id.* Gilchrist cited MISS. CODE ANN. § 11-7-45 and Rule 10(d) in his objection; however, the court noted that § 11-7-45, which required writings sued upon to be attached to pleadings, has been supplanted by 10(d). *Gilchrist*, 493 So. 2d at 1290-91.

[38] *Gilchrist*, 493 So. 2d at 1292. MISS. CODE ANN. § 11-7-45 served to exclude evidence if such was not properly attached to the pleadings. *Gilchrist*, 493 So. 2d at 1291. *See* Columbus & Greenville Ry. v. Mississippi Clinic, 153 Miss. 29, 38, 120 So. 203, 205 (1929)(statute entitled appellant to bill of particulars of appellee's demand so that appellant could make defense thereto); Wolff v. Hopkins, 145 Miss. 827, 831, 111 So. 290, 290-91 (1927)(statute required itemized payroll to be compiled and attached to complaint if evidence of such were to be entertained); Lawson v. Dean, 144 Miss. 309, 313, 109 So. 801, 802 (1926)(error to admit into evidence bond not annexed to or filed with complaint). Accordingly, if the requirements of attachment under § 11-7-45 were not met, a demurrer was proper. Palmetto Fire Ins. Co. v. Allen, 141 Miss. 681, 690-91, 105 So. 769, 769 (1925).

[39] *Gilchrist*, 493 So. 2d at 1292.

[40] *Id.* Noting the limited scope of its review of the facts, the court deemed as neces-

B. Rule 17: Real Parties in Interest — Subrogation Cases

In *Turner v. Haynes*,[41] the supreme court examined a question posed under Rule 17 when relinquishment of subrogation rights has occurred. Rule 17(a) requires that an action be prosecuted in the name of the real party in interest.[42] Rule 17(b) allows an action in which subrogation exists to be brought in the name of the subrogee where the subrogor no longer has a pecuniary interest in the case.[43]

In *Turner*, Jamie Turner was involved in an automobile accident with Laura Haynes.[44] Turner's insurance carrier, Blue Cross/Blue Shield, paid medical insurance benefits to Turner and was subrogated against Haynes to the extent of the benefits paid. However, Turner reimbursed her carrier, which in turn relinquished all of its subrogation right, specifically renouncing any interest as a subrogee under Rule 17.[45] Turner's suit against Haynes was dismissed on Haynes' motion for failure to join the insurance carrier.[46]

On appeal, the supreme court held that Blue Cross/Blue Shield was neither a subrogee under Rule 17(b) nor a real party in interest under Rule 17(a).[47] The purposes of Rule 17 were held to be ones of protection of litigants from multiple suit by persons not bound by res judicata and of permission to defendant to raise his defenses against

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sary two additional deductions from the award based on billing claims similar to those disallowed at trial and for which the evidence showed an absence of basis in fact. *Id.* On the other hand, the court affirmed the award based on billings submitted to Gilchrist with general and otherwise inadequate summaries of services rendered due to the client's acquiescence to the billing system and the attorney's detrimental reliance on that acquiescence. *Id.* Finally, since the record showed no adjudication of the issue of payment of expenses, the expenses portion of the award was vacated and that issue was remanded. *Id.* at 1294.

[41] 489 So. 2d 494 (Miss. 1986).

[42] Miss. R. Civ. P. 17(a).

[43] Miss. R. Civ. P. 17(b).

[44] *Turner*, 489 So. 2d at 495.

[45] *Id.* at 495-96.

[46] *Id.* at 496.

[47] *Id.* at 497. The court stated that 17(b) was not applicable in this case since none of the parties claimed subrogation rights and since the carrier had relinquished all subrogation rights it may have had; instead, 17(a) controlled the case. *Id.* For guidance, the court looked to Peyton v. Pascagoula Drayage Co., 69 F.R.D. 19 (N.D. Miss. 1975), where, as in *Turner*, an insurance carrier entered a reimbursement agreement with the insured. Applying the holding of *Peyton*, the court found that the carrier was not a real party in interest since the only interest the carrier preserved was an indirect one in the outcome of the insured's case due to its effective waiver of its right to participate in the action. *Turner*, 489 So. 2d at 497.

the proper persons and secure a final judgment.[48] In view of these purposes, since the carrier looked entirely to Turner for reimbursement, Haynes did not face the possibility of a subsequent judgment from the carrier, nor did she have any defenses against the carrier that she did not have against Turner; thus, no purpose of Rule 17 was thwarted.[49] Furthermore, since the carrier had released all its subrogation rights, it no longer had a pecuniary interest requiring joinder under Rule 17(b).[50]

In a concurring opinion, Justice Robertson[51] agreed that the record as presented by this case was inadequate to establish the carrier as a real party in interest under Rule 17(a) but noted facts which, if shown, would require joinder of a carrier in a position such as that of Blue Cross/Blue Shield in this case.[52] According to the concurrence, the carrier should be required to be joined if it had decided to bring the action, employed counsel, footed the costs or otherwise substantially controlled the litigation.[53]

C. *Rule 60: Relief from Judgment or Order*

In *Bryant, Inc. v. Walters*,[54] the supreme court considered the standard required under Rule 60(b) for granting relief from a default judgment ordered pursuant to Rule 55.[55] Rule 60(b) provides several grounds for relief, including fraud, misrepresentation or other miscon-

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[48] *Turner*, 498 So. 2d at 496, *citing* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1541 at 635-36 (1971).

[49] *Turner*, 489 So. 2d at 497-98.

[50] *Id.* at 497.

[51] *Id.* at 498. Justice Hawkins joined in the concurring opinions.

[52] *Id.* The concurring opinion urged joinder if in addition to the facts in *Turner* the record also showed that the carrier made the decision to bring the suit, that the carrier advanced costs for the suit, that counsel reported to the carrier as well as to the insured, or that the carrier otherwise had substantial control of the litigation. *Id.* (Robertson, J., concurring).

[53] *Id.* In Justice Robertson's view, the party moving for joinder has the burden of establishing in the record the necessary facts for joinder of the carrier. *Id.* (Robertson, J., concurring).

[54] 493 So. 2d 933 (Miss. 1986).

[55] Rule 55(a) provides for default when a party fails to plead or otherwise defend a claim through which judgment is brought against him. Rule 55(b) allows the party entitled to default to apply for such judgment and the adverse party to receive written notice three days before hearing on the application if he has appeared in the action. Rule 55(b) also gives the court discretionary power to enter judgment by default on the trial date without notice. Rule 55(c) states that "[f]or good cause shown," a default entry may be set aside and a default judgment can be set aside pursuant to Rule 60(b).

duct of the adverse party, accident or mistake, and void judgment.[56]

In *Bryant*, Bryant, Inc. obtained a default judgment based on a suit on open account against Victor Walters.[57] Walters' motion to set aside the judgment was granted based on the fact that no proper itemized account was attached to the complaint.[58] An amended complaint and answer thereto were filed and trial was held; Walters put forth a meritorious defense that the account was due but was owned not by him individually but by Victor Walters Distributors, Inc.[59] Walters received a jury verdict and judgment in his favor; Bryant, Inc. appealed claiming error in vacating the default judgment.[60]

On appeal, the supreme court found that Bryant, Inc. had been in

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[56] MISS. R. CIV. P. 60(b) allows for relief based on six grounds:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or if is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

MISS. R. CIV. P. 60(b).

[57] *Bryant*, 493 So. 2d at 934.

[58] *Id.* The incompleteness of the attached itemized account posed a Rule 10(d) problem. *See infra* notes 34-38 and accompanying text.

Even though the trial court had specifically held that Walters' judgment was not set aside under Rule 60(b)(2), the court examined that rule, drawing special attention to the difference in MISS. R. CIV. P. 60(b)(2) and FED. R. CIV. P. 60(b)(1) and noting that the state rule allows relief only for "accident or mistake" while the federal rule allows relief for "mistake, inadvertence, surprise, or excusable neglect." *Bryant*, 493 So. 2d at 936. Because judges have discretionary power under 60(b)(2), the court held that the interpretation of this rule is the same as the pre-rules general rule that a judgment will not be set aside in absence of a showing that the defendant had a meritorious defense. *Id.* at 937. *See, e.g.*, Ponder v. O'Neal Elec. Co., 214 So. 2d 453, 455 (Miss. 1986)(meritorious defense is necessary element of motion to set aside default judgment); Planters' Lumber Co. v. Sibley, 130 Miss. 26, 35, 93 So. 440, 441 (1922)(defendant must have set forth defense so that court can determine whether it is meritorious or not). Although Walters' meritorious defense was that his corporation, not he individually, was liable, he had failed to show at trial that he had disclosed to Bryant that he was acting as agent for his corporation, and therefore, Walters had not met his positive duty to clearly disclose his agency if he were to escape liability. *Bryant*, 493 So. 2d at 937; *see* Kelly v. Guess, 157 Miss. 157, 161-63, 126 So. 264, 276 (1929)(payee of note representing loan executed by agent acting for undisclosed principal has right of action against agent, principal, or both); Hatley Mfg. Co. v. Smith, 154 Miss. 846, 854-58, 123 So. 887, 889-90 (1929)(where principal is undisclosed, agent can be held accountable for debt).

[59] *Bryant*, 493 So. 2d at 934.

[60] *Id.* at 935.

literal compliance with Rule 55's rules for default and that final judgment had been entered; thus much more was required of Walters to get the judgment set aside than would have been required if only a default had been entered.[61] Considering whether the judgment should have been set aside because the attached copy was so defective as to render the judgment a nullity under 60(b)(2), the court noted that a judgment cannot be set aside simply because it is erroneous,[62] but it can be vacated if it is void.[63] Noting that this rule has been interpreted so as to allow relief only when a judgment is void for lack of jurisdiction[64] or if the court acted inconsistently with due process of law,[65] the court analogized the federal due process requirement to the pre-rules decisions holding that no judgment can be rendered on a pleading which states no cause of action.[66] Because Bryant's complaint clearly stated a cause of action, there existed no compelling reason for rigid compliance with Mississippi Rule Civil Procedure 10(d), which requires a copy of the account sued upon to be attached to the pleadings.[67] Thus, the admittedly incomplete copy attached to the original complaint did not render the default judgment void.[68] The court thus deduced that the default judgment had been properly entered by a court under due authority to do so and accordingly it was error to set aside that

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[61] *Id.* at 936.

[62] *Id.* at 937; *see* Marshall v. Board of Educ., 575 F.2d 417, 422 (3rd Cir. 1978)(judgment not within ambit of 60(b)(4) simply because it is erroneous); Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers, Local No. 480, 460 F.2d 105, 108 (5th Cir. 1972)(no relief from judgment available if judgment was only in error and not void).

[63] MISS. R. CIV. P. 60(b)(4); *see* Burns v. Delta Loans, Inc., 354 So. 2d 268, 270 (Miss. 1974)(courts have inherent power to correct invalid and void provisions in their judgments); Whiteway Finance Co. v. Parker, 226 So. 2d 903, 904 (Miss. 1969)(judgment can be vacated at subsequent term of court when it is void due to fraud in its procurement or when court lacked power to enter it).

[64] *Bryant*, 493 So. 2d at 938. In Strain v. Gayden, 197 Miss. 353, 20 So. 2d 697 (1945), the court held that a court which has subject matter and personal jurisdiction and renders judgment on a case during term does not have jurisdiction to set aside that judgment at a subsequent term.

[65] *Bryant*, 493 So. 2d at 938. Federal courts have held that a judgment is void only where the rendering court had no jurisdiction or acted in violation of due process. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2862 at 199-200 (1971).

[66] *Bryant*, 493 So. 2d at 938. The court cited several cases supporting the pre-rules position. *See, e.g.*, Roberts v. James Mfg. Co., 197 So. 2d 808, 810 (Miss. 1967), (complaint must present good cause of action if default judgment is to be sustained).

[67] *Bryant*, 493 So. 2d at 938. The court noted that since discovery statutes and rules are liberal and since documents can easily be obtained on a simple motion to produce, rigid application of Rule 10(d) is not necessary. For a complete analysis of Rule 10(d), *see supra* notes 34-39 and accompanying text.

[68] *Bryant*, 493 So. 2d at 939.

judgment.[69]

II. Conditions for Continuance

In *Owens v. Whitwell*,[70] Jesse and Nancy Owens filed a medical malpractice suit against two doctors.[71] After the trial court excluded the Owens' expert witness on the doctors' motion,[72] the Owens moved for a continuance.[73] The continuance was made conditional on the Owens paying court costs and the doctors' expenses which would result from the continuance; however, because Owens could not afford the suggested payment,[74] the trial proceeded until objections to all of the Owens' other experts were also sustained.[75] Once again, the Owens moved for a continuance and once again, the court conditioned the continuance upon payment of the doctors' and their attorneys' expenses.[76] Under protest, the Owens delivered the set amount without the opportunity to examine the affidavits which set the costs and so received a continuance.[77]

The Owens appealed the trial court's imposition of the payment as a condition for a continuance and inclusion as "costs" legal fees of opposing counsel and lost earnings of the doctors.[78] The court held that since the Owens adequately supplemented their responses to the doctors' interrogatories and since no order to compel further discovery followed, then no imposition of a monetary condition as a sanction would be allowed.[79] The court further held that because all litigating parties

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[69] *Id.*

[70] 481 So. 2d 1071 (Miss. 1986).

[71] *Id.* The Owens alleged malpractice resulting in spinal injuries to Mrs. Owens and loss of consortium to Mr. Owens. *Id.*

[72] *Id.* at 1072. In response to the Owens' answers to interrogatories the doctors filed a motion to disqualify one of the Owens' listed expert witnesses due to his lack of familiarity with local medical practices at that time. *Id.* at 1072-73. The supreme court noted that the problem in *Owens* arose due to a miscomprehension of the locality rule and stated that if the Owens had been allowed to show that their witness had indeed become familiar with local practices then the cases never would have arisen. *Id.* at 1076, *see* King v. Murphy, 424 So. 2d 547 (Miss. 1982)(expanded locality rule governing medical expert witnesses).

[73] *Owens*, 481 So. 2d at 1073.

[74] *Id.* The court set the payment at $36,200, a figure based on a list of expenses submitted by the doctors' attorneys. *Id.*

[75] *Id.* at 1073-74.

[76] *Id.* at 1076. This time the court ordered the doctors and their counsel to present affidavits stating their expenses. *Id.* at 1074-76.

[77] *Id.* at 1076.

[78] *Id.* at 1071.

[79] *Id.* at 1077. The doctors argued that the payment was imposed as a sanction for

and counsel experience similar inconvenience, worry, and financial losses during the litigation process, the imposition of monetary compensation for such expenses as a condition for continuance is improper.[80]

In a dissenting opinion, Justice Hawkins[81] stated that conditioning a continuance on the payment of reasonable costs and expenditures is properly within a court's power and suggested that the rule allowing a court to use its discretion in determining expenses incurred in trial preparation[82] be accepted by the supreme court.[83] While noting that preventing inspection of the affidavits covering expenses was error, Justice Hawkins viewed the majority's denial of a court's power to impose monetary conditions as a ruling which will work a hardship on blameless parties who must pay for the unnecessary expenses of a continuance.[84]

III. Interlocutory Appeal from Circuit Court

In *Kilgore v. Barnes*,[85] defendants in a medical malpractice action[86] made a motion for summary judgment which was denied.[87] The defendants made application for interlocutory appeal from the circuit court.[88] The supreme court granted the application, holding that, contrary to prior decisions, interlocutory appeals could be taken from cir-

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failure to make discovery and as such was justifiable and allowable pursuant to Miss. Code Ann. § 13-1-237. *Owens*, 481 So. 2d at 1076-77. This argument failed, however, due to the standards of Denman v. Hardy, 437 So. 2d 426, 429 (Miss. 1983), which allows for sanctions pursuant to § 13-1-237 with no prior order if there is total failure to respond to an interrogatory or if a response is of no substance, while a prior order is necessary for sanctions if the response is incomplete or evasive. *Owens*, 481 So. 2d at 1077.

[80] *Owens*, 481 So. 2d at 1077. The court stated that requiring such a payment in exchange for a continuance "was tantamount to aiming a loaded gun at [the Owens'] head." *Id.*

[81] Justice Robertson joined in the dissent.

[82] *Id.* at 1084, citing 17 C.J.S. Continuance § 104, at 486.

[83] *Owens*, 481 So. 2d at 1085 (Hawkins, J., dissenting).

[84] *Id.* at 1085-86 (Hawkins, J., dissenting).

[85] 490 So. 2d 895 (Miss. 1986).

[86] *Id.* Defendants were two physicians; the Surgical Clinic, P.A.; and Mississippi Baptist Medical Center. *Id.* Plaintiff Woodrow Barnes claimed personal injuries resulting from a surgical needle which was left in his heart during surgery. *Id.*

[87] *Id.* The basis of the motion for summary judgment was that the general six-year statute of limitations provided by Miss. Code Ann. § 15-1-49 (1972) had run. *Kilgore*, 490 So. 2d at 895. On appeal, the plaintiff-appellee contended that Miss. Code Ann. §15-1-36 (1972) provided a two year limitation which commences from the date that the alleged malpractice was or should have been known or discovered.

[88] *Kilgore*, 490 So. 2d at 895.

cuit court in exceptional circumstances.[89] The court noted that interlocutory appeals from chancery court are permitted by statute[90] and reasoned that there was no valid purpose in allowing such appeals from chancery while having a rigid rule prohibiting them from circuit courts.[91] The court held, however, that interlocutory appeals would be allowed only under the most extraordinary circumstances, such as when it appeared that the appeal would finally settle the controlling principles of law in a case or when it would settle a new or unique proposition of law pending before several of the trial courts.[92] Avoiding waste of time or expense was considered to be an additional favorable factor, but not the sole basis for granting such an interlocutory appeal.[93] The court stated that the *Kilgore* case was appropriate for interlocutory appeal since a decision favorable to appellant-defendants would settle the controlling principle of law which was unclear, avoid a lengthy and costly trial, and affect other similar pending cases.[94]

In a dissenting opinion, Justice Hawkins argued that the previous rules on interlocutory appeals had worked well and that the new rule would only serve to cause more problems than it would solve.[95] Justice

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[89] *Id.* at 896. Historically, the Mississippi Supreme Court has been staunch in its refusal to allow interlocutory appeals from circuit court. *See, e.g.*, Cotton v. Veterans Cab Co. 344 So. 2d 730, 731 (Miss. 1977)(appeals from circuit court lie only from final judgment); State Tax Comm'n v. Clinton, 267 So. 2d 312, 314 (Miss. 1972)(no interlocutory appeal entertained from circuit courts except on order for new trial based on excessiveness or inadequacy of damages). MISS. CODE ANN. § 11-51-3 (1972) provides for appeal from circuit court only when a final judgment has been entered. However, in 1984 the court granted such an appeal but did so without discussion of its power to do so. Southern Farm Bureau Casualty Ins. v. Holland, 469 So. 2d 55 (Miss. 1984). The majority opinion in *Southern Farm Bureau* was met with two dissents which attacked the prerogative of the court to grant such an appeal. *Id.* at 60-62 (Walker, J., dissenting, joined by Roy Noble Lee, Jr.; Hawkins, J., dissenting). However, Justice Anderson wrote a special concurrence to the majority opinion in which he supported the granting of an interlocutory appeal from circuit court on the basis of the supreme court's power to promulgate rules of procedure, especially where such rules would increase "efficient disposition of judicial business." *Id.* at 62-64.

[90] *Kilgore*, 490 So. 2d at 895. MISS. CODE ANN. § 11-51-7 (1972) allows for interlocutory appeals from chancery court when the chancellor believes that such an appeal will "settle all the controlling principles involved in the cause, or in exceptional case to avoid expense and delay."

[91] *Kilgore*, 490 So. 2d at 896.

[92] *Id.*

[93] *Id.*

[94] *Id.* The court ordered the clerk of the court to place the case on the next calendar for hearing the appeal on its merits. *Id.*

[95] *Id.* (Hawkins, J., dissenting).

Hawkins also expressed misgivings about the criteria for interlocutory appeals from circuit court as set forth by the majority.[96]

Pamela Wescovich-Roberts

[96] *Id.* (Hawkins, J., dissenting).

CONTRACTS AND COMMERCIAL LAW

In 1986, the Mississippi Supreme Court decided sixteen cases involving contracts and commercial law. These cases addressed summary judgment on a promissory note,[1] set-off in a breach of lease suit,[2] breach of an equipment leasing contract,[3] real estate as collateral for a promissory note,[4] termination of public school teachers' contracts,[5] the application of Article 2 of the Uniform Commercial Code to equipment leases,[6] authority of officers to bind their corporation,[7] breach of warranty,[8] revocation of acceptance of an automobile,[9] attorneys' fees under the Magnuson-Moss Warranty Act,[10] third party beneficiaries to a release agreement,[11] rights of named accountholders where the bank

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[1] Hill v. Consumer Nat'l Bank, 482 So. 2d 1124 (Miss. 1986)(affirmative defense that promissory note was signed in blank under agreement that representative capacity will be completed by holder must be supported by depositions, interrogatories, or affidavits based on personal knowledge).

[2] Burnham v. Joseph, 482 So. 2d 1151 (Miss. 1986)(where damages can be shown by reasonable certainty and in view of all evidence fair-minded men in exercise of impartial judgment might reach different conclusions, motion for directed verdict must be denied).

[3] Briscoe's Foodland, Inc. v. Capital Assoc., 502 So. 2d 619 (Miss. 1986). *See infra* note 35.

[4] Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986). *See infra* notes 16-29 and accompanying text.

[5] Noxubee County School Bd. v. Cannon, 485 So. 2d 302 (Miss. 1986)(school board must take affirmative action to give notice of nonrenewal of teachers' contracts and may not merely sit by and deem offer lapsed if teacher fails to execute contract).

[6] J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851 (Miss. 1986). *See infra* notes 30-45 and accompanying text.

[7] Baxter Porter & Sons Well Servicing Co. v. Venture Oil Corp., 488 So. 2d 793 (Miss. 1986)(executive officer of close corporation, carrying on usual business of corporation, has same apparent authority to bind corporation as partner in partnership).

[8] Fedders Corp. v. Boatright, 493 So. 2d 301 (Miss. 1986)(manufacturer of defective product rather than authorized dealer, is liable for breach of warranty); Anchor Coatings, Inc. v. Marine Industrial Residential Insulation, Inc., 490 So. 2d 1210 (Miss. 1986)(manufacturer liable for breach of implied warranties of merchantability and fitness for particular purpose).

[9] Rester v. Morrow, 491 So. 2d 204 (Miss. 1986). *See infra* notes 46-57 and accompanying text.

[10] Chrysler Corp. v. Evans, 493 So. 2d 982 (Miss. 1986)(failure to follow informal procedures in express warranty before filing action under Magnuson-Moss Warranty Act will preclude award of attorney's fees).

[11] Country Club of Jackson, Miss., Inc. v. Saucier, 498 So. 2d 337 (Miss. 1986)(release agreement which is not executed for benefit of third party may be modified without consent of third party).

account is opened by and with the funds of a third party,[12] liability of an accommodation indorser to the guarantor on a note,[13] oral modification of a construction contract containing a clause prohibiting oral modification[14], and the propriety of directing a verdict based on the insufficiency of a counteraffidavit in a suit on open account.[15]

I. Impairment of Collateral Securing Promissory Note

In *Hughes v. Tyler*,[16] the Mississippi Supreme Court determined that the Uniform Commercial Code applied to a negotiable promissory note which was secured by real estate.[17] Hughes sold 1,256 acres of land to Tyler in 1977.[18] Tyler acquired a loan from Travelers Indemnity Company for $1,000,000 and executed a promissory note to Hughes in the amount of $100,000.[19] Later Tyler conveyed the land to Wisenhunt who, by agreement of all parties, assumed both loans.[20] After a series of transactions, Hughes allowed his note to be subordinated to the Travelers loan and released part of the land as collateral.[21]

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[12] Carter v. State Mut. Fed. Sav. & Loan Ass'n, 498 So. 2d 324 (Miss. 1986)(where bank account is opened by one person in name of another, account does not become property of person named until completed gift is made and person opening account has relinquished all dominion and control over account).

[13] Comfort Eng'g Co. v. Kinsey, No. 55,890 (Miss. Nov. 19, 1986)(where guarantor, who is primarily liable, pays holder of note, the accommodation party who endorses note owes no duty to guarantor).

[14] City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354 (Miss. 1986)(where owner and architect/engineer do not act in good faith in disallowing payments to contractor for work performed on oral request, reasonable compensation must be paid even where contract contains clause prohibiting oral modification).

[15] McLaurin v. Smith's Poultry & Farm Supply, Inc., 499 So. 2d 1361 (Miss. 1986)(defendant in suit on open account who does not file affidavit particularly refuting correctness of account pursuant to Miss. Code Ann. § 13-1-141 (Supp. 1986) is not precluded from asserting other defenses).

[16] 485 So. 2d 1026 (Miss. 1986).

[17] *Id.* at 1029. The U.C.C. does not apply to a security interest in real estate. Best Fertilizers of Ariz., Inc. v. Burns, 117 Ariz. 178, 571 P.2d 675 (1979). In *Hughes*, the court relied on Miss. Code Ann. § 75-3-112 which states "The negotiability of an instrument is not affected by . . . a statement that collateral has been given to secure obligations . . . ." Miss. Code Ann. § 75-3-112 (1972). *See also* 2 R. Anderson, Uniform Commercial Code 680 (2d ed. 1971)(recital of existence of collateral to secure instrument does not affect negotiability).

[18] *Hughes*, 485 So. 2d at 1027.

[19] *Id.* The promissory note was due on or before March 15, 1982. *Id.*

[20] *Id.*

[21] *Id.* at 1027-28. Whisenhunt assumed the outstanding amount on the Travelers loan, $980,000, and then paid $500,000 of the loan in exchange for the release of 776 acres of the collateral. *Id.* Whisenhunt received a second loan from Travelers in the

Wisenhunt then defaulted on both loans, and Travelers foreclosed on its deed of trust.[22] Hughes made a demand on Tyler who failed to pay the note.[23]

Tyler claimed that he should be released from the note because Hughes had unreasonably impaired the collateral.[24] Hughes argued that the discharge rules of the Uniform Commercial Code did not apply to the original maker of the note.[25] The court first held that section 75-3-606 of the Mississippi Code[26] was available to "any party who has no right, title or interest in the security"[27] and that Tyler was such a party.[28] Second, the court found that, in this case, Hughes unreasona-

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amount of $790,000 using the released 776 acres plus an additional 15 acres as security. *Id.* In September 1978, Hughes executed a subordination agreement, subordinating his promissory note to the two deeds of trust held by Travelers. *Id.* In 1980, Whisenhunt paid $50,000 on the promissory note in exchange for a second subordination agreement in favor of Travelers and for a release of 776 acres of land. *Id.* Tyler was not aware of the second subordination agreement and did not consent to it. *Id.*

[22] *Id.* Travelers was the only bidder at the foreclosure sale, bidding principal and interest on its loans and cost of the sale. *Id.* Hughes received no funds from the sale. *Id.*

[23] *Id.*

[24] *Id.* at 1029.

[25] *Id.*

[26] *Id.* This section reads, "The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse." MISS. CODE ANN. § 75-3-606 (1972). Official Comment 1 to the U.C.C. states:

> The words "any party to the instrument" remove any uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are "secondarily liable," but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so.

U.C.C. § 3-606, Official Comment (1978). *See also* Wohlhunter v. St. Charles Lumber & Fuel Co., 62 Ill. 2d 116, 338 N.E.2d 179, 182 (1975)(although term "any party" was intended to include parties who sign ostensibly as makers but who are in fact sureties or accommodation makers, provisions of § 3-606 do not apply to co-makers); Mikanis Trading Corp. v. Block, 59 A.D.2d 689, 398 N.Y.S.2d 679, 681 (1977)(availability of defense of impairment of collateral not limited to accommodation party).

[27] *Hughes*, 485 So. 2d at 1029.

[28] *Id.* The court maintained that a liberal reading of the statute made it applicable to a primary party as well as an accommodation party. *Id.*; *see* Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81, 83 (1968)("any party" was broad enough to include all makers and endorsers); Southwest Fla. Prod. Credit Assoc. v. Schirow, 388 So. 2d 338, 339 (Fla. Dist. Ct. App. 1980)(language of statute was clear and unambiguous and plain meaning of "any party" includes co-maker as well as accommodation party or surety). However, the court acknowledged that one line of authority holds that a primary party was not discharged unless he was in the position of a surety or an accommodation

bly impaired the security so as to release Tyler from his obligation under the note.[29]

II. Application of Article 2 of Uniform Commercial Code to Equipment Leases and Automobile Sales

In *J.L. Teel Co. v. Houston United Sales, Inc.*,[30] Houston entered a lease agreement with J.L. Teel under which J.L. Teel would provide Houston with a copy machine.[31] The machine was installed on May 15, 1979 and was operable for a little over a month.[32] On August 7, Houston requested that J.L. Teel pick up the copier and release Houston from its obligations under the lease.[33] The lower court found that the

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party. *Hughes*, 485 So. 2d at 1029. *See* Toomey v. Cammack, 345 A.2d 453, 456 (D.C. 1975)(maker of note did not become surety by assigning obligation unless all parties agreed and in absence of agreement he was not discharged); Main Bank of Chicago v. Baker, 86 Ill. 2d 188, 427 N.E.2d 94, 101 (1981)(defense of impairment of collateral does not apply to makers or co-makers); Commerce Union Bank v. Davis, 581 S.W.2d 142, 145 (Tenn. App. 1978)(impairment of collateral defense was not available to original maker); Hopper v. Ryan, 581 S.W.2d 237, 238 (Tex. Civ. App. 1979)(impairment of collateral provision applied to sureties and not co-makers on note), *overruled on other grounds*, 691 S.W.2d 582, 585 (Tex. 1985); Peoples Bank v. Pied Piper Retreat, Inc., 158 W. Va. 170, 209 S.E.2d 573, 578 (1974)(discharge by reason of unjustifiable impairment was not available to makers). The court held that "something approaching a trust relationship" existed between the holder of a note and a party who signed the note but had no right, title, or interest in the security, and the holder could not dispose of the collateral as he pleased to the detriment of the signatory. *Hughes*, 485 So. 2d at 1029.

[29] *Hughes*, 485 So. 2d at 1029. Although the appraised value of the land was sufficient to cover both the Travelers loans and the Tyler note, the court concluded that land was not liquid and was rarely readily marketable at its appraised value. *Id.* Additionally, the court found that the subordination agreements and partial release increased the debt percentage to an unreasonable amount even though the loan appeared to be secure on paper. *Id.* at 1030.

[30] 491 So. 2d 851 (Miss. 1986).

[31] *Id.* at 853. Houston agreed to pay $160 per month for 36 months with an option to purchase the copier for five percent of the original gross lease price. *Id.* Houston was responsible for insurance, taxes, and maintaining the equipment in good operating condition. *Id.* The lease also contained a disclaimer of implied warranties of merchantability and fitness for a particular purpose. *Id.* J.L. Teel gave an express warranty that the copier would be free of defects of material and workmanship under normal use and service. *Id.*

[32] *Id.* On June 25, 1979, J.L. Teel made the first of eight service calls on the machine. *Id.* On one visit, the entire computer of the machine required replacement. *Id.*

[33] *Id.* at 853-54. J.L. Teel did not take the machine, and problems with its operation continued through November. *Id.* J.L. Teel offered to replace the copier with another machine, but Houston again requested that J.L. Teel release it from the lease. *Id.* at 854. When J.L. Teel attempted to take the copier, Houston refused to surrender it until J.L. Teel signed a document releasing Houston from further liability. *Id.* Houston place the

copier failed to perform, but nevertheless entered judgment in favor of J.L. Teel for monthly rentals and supplies and service costs furnished by J.L. Teel.[34]

The supreme court first addressed the applicability of Article 2 of the Uniform Commercial Code to a two party equipment lease transaction.[35] Although some courts have held that Article 2 applies in its entirety,[36] the Mississippi Supreme Court adopted a "by analogy" approach.[37] Under this view, Article 2 by analogy furnishes the governing law but only to the extent that the lease is the functional equivalent of a sale and the Article 2 provisions otherwise fit.[38] The court stated

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copier in storage and continued to refuse its surrender until release documents were signed. *Id.*

[34] *Id.*

[35] *Id.* at 855. In Briscoe's Foodland v. Capital Assoc., 502 So. 2d 619 (Miss. 1986), Briscoe's leased video monitoring equipment from Capital. *Briscoe's*, 502 So. 2d at 620. Capital purchased the equipment from Stanco Communications and disclaimed all warranties of merchantability and fitness for a particular purpose. *Id.* All warranties on the equipment were provided by Stanco. *Id.* The Mississippi Supreme Court held that Capital merely acted as a financing agency and that the lease agreement in the three party transaction was not sufficiently analogous to a sale to impose Article 2 warranties. *Id.*

[36] *E.g.* DeKalb Agresearch v. Abbott, 391 F. Supp. 152, 153-54 (N.D. Ala.)(since contract was lease it was not covered by U.C.C.), *aff'd*, 511 F.2d 1162 (5th Cir. 1974); M & W Farm Service Co. v. Callison, 285 N.W.2d 271, 274-75 (Iowa 1979)(U.C.C. provisions do not apply to true lease but only to contracts for present or future sale of goods); Leasco Data Processing Equip. Corp. v. Starline Overseas Corp., 74 Misc. 2d 898, 346 N.Y.S.2d 288, 290-91 (lease of billing machine not sale of goods within scope of Article 2), *aff'd*, 45 A.D.2d 992, 360 N.Y.S.2d 199 (App. Div. 1973); O.J. & C. Co. v. General Hosp. Leasing, Inc., 578 S.W.2d 877, 878 (Tex. Civ. App. 1979)(lease of computer not subject to Article 2 since no sale involved); Three Bears, Inc. v. Transamerican Leasing Co., 574 S.W.2d 193, 199 (Tex. Civ. App.)(lease of restaurant equipment not within Article 2), *aff'd in part, rev'd in part on other grounds*, 586 S.W.2d 472 (Tex. 1978).

[37] *J.L. Teel*, 491 So. 2d at 857.

[38] *Id.*; *see* Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46, 54 (1968)(Article 2 warranty provisions applicable to leases when provisions of lease are analogous to sale); W.E. Johnson Equip. Co. v. United Airlines, 238 So. 2d 98, 100 (Fla. 1970)(application of warranty of fitness for particular purpose to lease); Glenn Dick Equip. Co. v. Galey Constr., Inc., 97 Idaho 216, 541 P.2d 1184, 1188-90 (1975)(adopting "by analogy" approach to application of Article 2 to lease transactions); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392, 395 (1969)(discussing reasons for applying Article 2 to equipment leases), *rev'd on other grounds*, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (1970); *see also* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV., 653 *passim* (discussing merits of using reasoning by analogy in non-sales cases to impose Article 2 warranties). For cases applying provisions of Article 2 other than the warranty provisions, see William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262, 270 (3d Cir. 1975)(adequate assurances and anticipatory repudiation); KLRP-TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315, 326 (W.D. Ark. 1971)(application of §§ 2-714 and -715, damages), *aff'd*

that, in determining whether Article 2 governs a particular equipment lease transaction, the fundamental inquiry is whether, under the totality of the circumstances, the lease is the functional equivalent of a sale.[39]

In *J.L. Teel*, the court found the lease to be the functional equivalent of a sale.[40] As such, the court then looked to the provisions of Article 2 that would apply by analogy.[41] The court held that J.L. Teel breached the warranty of fitness for a particular purpose[42] and the warranty of merchantability.[43] The court also looked to Article 2 for Houston's remedies for breach of the warranties.[44] The case was

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in part, rev'd in part and remanded, 465 F.2d 1382 (8th Cir. 1972); Addressograph-Multigraph Corp. v. Zink, 273 Md. 277, 329 A.2d 28, 33-34 (1974)(applying reasonable notice and damage provisions of Article 2); Tenavision, Inc. v. Neuman, 45 N.Y.2d 145, 408 N.Y.S.2d 36, 379 N.E.2d 1166, 1168 (1978)(anticipatory repudiation); Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405, 407 (1971)(disclaimer of liability and consequential damages provisions).

[39] *J.L. Teel*, 491 So. 2d at 858. Factors which should be considered in deciding whether a lease is functionally equivalent to a sale include, but are not limited to:

1.Whether the term of the lease is roughly equivalent to the expected useful life of the equipment.

2.Whether the gross rentals for the terms are approximately what the time-price differential would have been had the equipment been purchased on an installment basis.

3.Who has the burden of insuring the equipment?

4.Who pays the taxes?

5.Has the lessor furnished goods with respect to which the lessee has the exclusive use and control?

Id.

[40] *Id.* at 859. J.L. Teel supplied the copier and gave an express warranty similar to those customarily given in sales transactions. *Id.* Houston had exclusive use and dominion of the copier, including the obligations to obtain insurance and pay any taxes. *Id.* At the end of the three-year lease term, Houston had an option to purchase for a relatively nominal additional sum. *Id.*

[41] *Id.*

[42] *Id.* J.L. Teel warranted to Houston that the copier was fit for the specific purposes which Houston required. *Id.*; *see* MISS. CODE ANN. § 75-2-315 (1972)(where seller has reason to know any particular purpose for which goods are required and that buyer is relying on seller's skill or knowledge to select suitable goods, there is implied warranty that goods shall be fit for such purpose).

[43] *J.L. Teel*, 491 So. 2d at 859. J.L. Teel warranted that the copier was fit for the ordinary purpose of making copies. *Id.*; *see* MISS. CODE ANN. § 75-2-314 (1972)(warranty that goods shall be merchantable is implied in contract for their sale if seller is merchant with respect to goods of that kind).

Although J.L. Teel purported to disclaim all implied warranties, MISS. CODE ANN. § 11-7-18 (1972) holds any such disclaimer of warranties inoperative. *J.L. Teel*, 491 So. 2d at 859.

[44] *J.L. Teel*, 491 So. 2d at 860. The court determined that although, under MISS.

remanded for a determination of damages.[45]

In *Rester v. Morrow*,[46] Rester sued alleging the right to revoke acceptance of an automobile and recover the purchase price.[47] Rester purchased the automobile in April 1981.[48] Soon after the purchase, Rester discovered a number of defects in the operation of the car[49] and began a series of visits to dealerships to have various problems with the car repaired. Eventually, Rester was forced to purchase another car for transportation.[50] After five months, Rester informed the seller that he was rescinding the sale and demanded the purchase price, interest, and $4,000 in damages.[51] The trial judge sustained the defendant's motion for a directed verdict.[52]

CODE ANN. § 75-2-606(1)(b) (1972), Houston had accepted the copier, Houston's acceptance was induced by the difficulty of discovering the defects and by J.L. Teel's assurances as provided in MISS. CODE ANN. § 75-2-608 (1972). *J.L. Teel*, 491 So. 2d at 860. The court then reasoned that under MISS. CODE ANN. § 75-2-608(1) (1972) the defects were such that the value of the copier was substantially impaired and that Houston revoked its acceptance. *J.L. Teel*, 491 So. 2d at 860. However, the court found that Houston's refusal to surrender the copier was wrongful as against J.L. Teel, citing MISS. CODE ANN. § 75-2-602(2)(a) (1972). *J.L. Teel*, 491 So. 2d at 860.

[45] *J.L. Teel*, 491 So. 2d at 861. Because Houston held the copier after revocation of acceptance, the court stated that J.L. Teel was entitled to some remuneration for the use of the machine. *Id.* Although it was not entitled to the full contract price, the court allowed fair rental value of the copier. *Id.*; *see also* Stridiron v. I.C., Inc., 578 F. Supp. 997, 1003 (D.V.I. 1984)(recognizing authority to offset award based on buyer's use of goods after revocation); Lawrence v. Modern Mobile Homes, Inc., 562 S.W.2d 729, 732-33 (Mo. Ct. App. 1978)(buyer liable to seller for use of mobile home after notice of revocation of acceptance).

[46] 491 So. 2d 204 (Miss. 1986).

[47] *Id.* at 205.

[48] *Id.* at 206. The automobile was a 1981 Renault series 18i with 2,915 miles and was purchased from Tommy Morrow AMC. *Id.*

[49] *Id.* When the hazard lights were turned on, the radio also came on; there was a noticeable gasoline odor; the air conditioner did not work properly; and the oil indicator gauge did not work. *Id.*

[50] *Id.* at 206-09. Between May and September, the car was in the repair shop on approximately eight different occasions for various problems. *Id.* The main problems were that the air conditioner leaked excessively and emitted hot air instead of cold, the gas fumes continued, the battery smelled as if it were burning, and the car was prone to stall while being driven. *Id.*

[51] *Id.* at 209. Rester was required to make several out-of-pocket expenditures to various dealerships, and, in addition, paid $4,900 for a car to replace the Renault. *Id.* at 206-09. After suit was brought in January 1982, AMC sent a notice of defect stating that some Renault models had defective fuel lines causing a gasoline odor and possible fire hazard and that the car should not be driven if the owner noticed a fuel odor. *Id.* at 209.

[52] *Id.* The trial judge ruled that the defects did not substantially impair the value of the car. *Id.*

The Mississippi Supreme Court first stated that the issue of whether the automobile failed to conform to the seller's legal and contractual obligations and whether the nonconformity substantially impaired the value of the automobile[53] was a question for the jury.[54] Citing *J.L. Teel*, the court stated that Rester's acceptance was reasonably induced by the difficulty of discovering the defects before acceptance and by the seller's assurances.[55] The trial court was required to look not only to the particular complaints given by the purchaser on the day of the attempted revocation, but also to the totality of the circumstances leading up to the revocation in determining whether the purchaser had the right to revoke.[56] The court remanded the case for a

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[53] *Id.*; *see* MISS. CODE ANN. § 75-2-608(1) (1972)(buyer may revoke his acceptance of goods whose nonconformity substantially impairs its value to him); *see also* Volkswagen of America, Inc. v. Novak, 418 So. 2d 801, 804 (Miss. 1982)(value of automobile to consumer found to be substantially impaired). Under § 75-2-608, the value of goods must be substantially impaired *to the buyer*. *Rester*, 491 So. 2d at 211. While the statute contains a subjective standard, the court noted that there was also an objective standard. *Id.* Once it is determined that there is substantial impairment to the particular buyer, the court must look to whether the nonconformity would substantially impair the value to a reasonable person in the circumstances of the buyer. *Id.* For other cases discussing the combined subjective-objective test under U.C.C. § 2-608, see Keen v. Modern Trailer Sales, Inc., 40 Colo. App. 527, 578 P.2d 668 (1978); Stroh v. American Recreation & Mobile Home Corp. of Colo., 35 Colo. App. 196, 530 P.2d 989 (1973); Stamm v. Wilder Travel Trailers, 44 Ill. App. 3d 530, 358 N.E.2d 382 (1976); Asciolla v. Manier Oldsmobile-Pontiac, Inc., 117 N.H. 85, 370 A.2d 270 (1977).

[54] *Rester*, 491 So. 2d at 209. A question of ultimate fact may be taken from the jury only in conformity with the rule in Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss. 1975). In *Paymaster*, the Mississippi Supreme Court held that a motion for directed verdict encompassed testimony of the plaintiff and its reasonable inferences, whereas, the evidence considered on a request for peremptory instruction or judgment n.o.v. embraced testimony on behalf of the plaintiff as well as the defendant. *Paymaster*, 319 So. at 656. Citing General Tire & Rubber Co. v. Darnell, 221 So. 2d 104 (Miss. 1969), the court further ruled that if, when the evidence was considered in the light most favorable to the non-movant, the evidence and reasonable inferences drawn therefrom would support a verdict for the non-movant, then a motion for judgment n.o.v. should be denied. *Paymaster*, 319 So. 2d at 657. The *Paymaster* court concluded that, under this procedure, the court was permitted to examine the evidence of both parties and was not in conflict in order to reach a legal conclusion. *Id.* In this manner, the jury resolved conflicts of fact while the court resolved issues of law arising from nonconflicting facts. *Id.*

[55] *Rester*, 491 So. 2d at 209. *See supra* note 44; *see also* MISS. CODE ANN. § 75-2-608(1)(b) (1972)(revocation of acceptance of goods when buyer was reasonably induced by difficulty of discovery or seller's assurances).

[56] *Rester*, 491 So. 2d at 210. Although, under MISS. CODE ANN. § 75-2-508 (1972), the seller had a right to attempt to cure the problems with the goods, the seller did not have the right to perpetually postpone revocation by fixing each defect. *Rester*, 491 So. 2d at 210. *See* Seekings v. Jimmy GMC, 130 Ariz. 596, 638 P.2d 218, 218 (1981)(citing Orange

trial on all issues.[57]

III. Legislative Action

During 1986, the Mississippi legislature made several changes in the area of commercial law. Under prior law, a purchase money security interest was deemed perfected if the secured party filed a financing statement within ten days after the debtor received possession of the collateral.[58] Sections 75-2-301 and 75-2-312 have been amended to grant the secured party twenty days within which to file a purchase money security interest.[59]

The Legislature also enacted a statute which allows an oil and gas royalty owner to acquire a lien on the proceeds of production to ensure payment of his royalty.[60] Additionally, section 75-9-307 of the Mississippi Code was amended to provide that a security interest may not be

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Motors v. Dade County Dairies, Inc., 258 So. 2d 319 (Fla. App. 1972) for proposition that seller may not delay revocation indefinitely in hopes that goods could be made to conform to warranty); Orange Motors v. Dade County Dairies, 258 So. 2d 319, 320-21 (Fla. App. 1972)(seller did not have unlimited time to fulfill obligation to repair or replace parts; at some point it was obvious that goods could not be repaired and made free of defects); Welch v. Fitzgerald Hicks Dodge, 121 N.H. 358, 430 A.2d 144, 149 (1981)(where problems became so large as to call integrity of automobile into question, buyer may be justified in revoking acceptance even though some problems had been repaired or were repairable).

[57] *Rester*, 491 So. 2d at 212. Looking at the evidence in the light most favorable to the non-movant (Rester), the court stated that a reasonable juror could have found the value of the Renault substantially impaired to Rester, and therefore, the trial court erred in directing a verdict for Morrow. *Id.* at 211; *see supra* note 54 (discussing *Paymaster*).

[58] Miss. Code Ann. §§ 75-2-301(2) and -312(4) (1972).

[59] 1986 Miss. Laws ch. 343. The change took effect on July 1, 1986. *Id.*

[60] 1986 Miss. Laws ch. 466. Where the dispersing agent is the first purchaser, the royalty must be paid within 120 days following the date of first sale. *Id.* Where the dispersing agent is not the first purchaser, the royalty must be paid within 120 days after the date on which the dispersing agent received the proceeds. *Id.* In order to be effective against third parties, a financing statement must be filed in accordance with Miss. Code Ann. § 75-9-401 (1972), and it expires after one year unless judicial proceedings are commenced to enforce it or unless insolvency proceedings have been commenced by or against the dispersing agent. 1986 Miss. Laws ch. 466.

enforced against the purchaser of farm products in the ordinary course of business unless the secured party has followed certain procedures.[61]

C. Lee Cagle

[61] 1986 Miss. Laws ch. 482. In order to enforce the security interest, the secured party must comply with the regulations issued by the Secretary of State or the buyer must have received from the secured party or seller written notice of the security interest which complies with section 1324 of the Food Security Act of 1985. 1986 Miss. Laws ch. 482.

CRIMINAL LAW

Evidence: Miscellaneous

During 1986, the Mississippi Supreme Court responded to miscellaneous evidentiary assignments of error concerning weight and sufficiency of evidence,[1] hearsay,[2] former testimony,[3] reputation and character of witnesses,[4] impeachment of witnesses,[5] uncommunicated threats,[6] dying declarations,[7] and the res gestae exception to the hearsay rule.[8] Decisions rendered in these areas do not merit extensive textual discussion. However, the importance of several cases is briefly noted below.

The Mississippi Supreme Court rendered only one decision which

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[1] Parker v. State, No. 56,287 (Miss. July 16, 1986); Edwards v. State, 500 So. 2d 967, 969 (Miss. 1986); Brown v. State, 499 So. 2d 775, 776 (Miss. 1986); Temple v. State, 498 So. 2d 379, 382 (Miss. 1986); Dye v. State, 498 So. 2d 343, 343-44 (Miss. 1986); Russell v. State, 497 So. 2d 75, 76-77 (Miss. 1986); Griffin v. State, 495 So. 2d 1352, 1353-54 (Miss. 1986); Thomas v. State, 495 So. 2d 481, 482-83 (Miss. 1986); Coates v. State, 495 So. 2d 464, 465 (Miss. 1986); Bunkley v. State, 495 So. 2d 1, 3 (Miss. 1986); Dobson v. State, 494 So. 2d 575, 575 (Miss. 1986); Walker v. State, 493 So. 2d 1323, 1324 (Miss. 1986); Weeks v. State, 493 So. 2d 1280, 1283 (Miss. 1986); Mullins v. State, 493 So. 2d 971, 976 (Miss. 1986); Harveston v. State, 493 So. 2d 365, 375 (Miss. 1986); Drane v. State, 493 So. 2d 294, 300 (Miss. 1986); McBride v. State, 492 So. 2d 581, 586 (Miss. 1986); Whatley v. State, 490 So. 2d 1220, 1222-24 (Miss. 1986); Norris v. State, 490 So. 2d 839, 843-44 (Miss. 1986); Hentz v. State, 489 So. 2d 1386, 1388-89 (Miss. 1986); Hunter v. State, 489 So. 2d 1086, 1090-91 (Miss. 1986); Trunnel v. State, 487 So. 2d 820, 824 (Miss. 1986); Gill v. State, 485 So. 2d 1047, 1049 (Miss. 1986); Jenkins v. State, 483 So. 2d 1330, 1332 (Miss. 1986); Watson v. State, 483 So. 2d 1326, 1330 (Miss. 1986).

[2] Bridgeforth v. State, 498 So. 2d 796, 799-800 (Miss. 1986); Dye v. State, 498 So. 2d 343, 344 (Miss. 1986); Cooley v. State, 495 So. 2d 1362, 1363-64 (Miss. 1986); McBride v. State, 492 So. 2d 581, 584-86 (Miss. 1986); Hunter v. State, 489 So. 2d 1086, 1087-88 (Miss. 1986).

[3] Parker v. State, No. 55,877 (Miss. March 12, 1986); Stringer v. State, 491 So. 2d 837, 840-41 (Miss. 1986).

[4] White v. State, 498 So. 2d 368, 372 (Miss. 1986); Weeks v. Stone, 493 So. 2d 1280, 1284 (Miss. 1986); Mullins v. State, 493 So. 2d 971, 973-74 (Miss. 1986); Harveston v. State, 493 So. 2d 365, 373-74 (Miss. 1986).

[5] Hall v. State, 490 So. 2d 858, 859 (Miss. 1986); Horne v. State, 487 So. 2d 213, 215-16 (Miss. 1986); Brock v. State, 483 So. 2d 358, 361-62 (Miss. 1986).

[6] Gates v. State, 484 So. 2d 1002, 1007-09 (Miss. 1986).

[7] Watts v. State, 492 So. 2d 1281, 1285-89 (Miss. 1986).

[8] Parker v. State, No. 56,287 (Miss. July 16, 1986); Gill v. State, 485 So. 2d 1047, 1049-50 (Miss. 1986); Hemingway v. State, 483 So. 2d 1335, 1337 (Miss. 1986).

considered the admissible of dying declarations, *Watts v. State*.[9] This opinion provides an authoritative discussion of the Mississippi caselaw on this topic.[10]

In *Stringer v. State*[11] and *Parker v. State*[12] the court addressed the admissibility of former testimony. In *Stringer*, the prosecutor introduced a transcript of Stringer's former testimony, given at his father's trial, when he refused to take the stand.[13] Stringer objected to the admission of his former testimony and subsequently appealed his conviction.[14] The Mississippi Supreme Court held that the former testimony was hearsay and admissible only if it fit within one of the hearsay exceptions.[15] Since Stringer had elected to exercise his fifth amendment rights, this was sufficient to make him unavailable.[16] Accordingly, the court declared that any admission, inculpatory or against penal interest, could be read into evidence in the State's case-in-chief.[17]

In *Parker*,[18] the defendant had not been permitted to introduce

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[9] 492 So. 2d 1281 (Miss. 1986). MISS. R. EVID. 804(b)(2) specifically provides for the admissibility of dying declarations.

In *Watts*, Thomas McDonnell was fatally shot by Charles Watts, known by McDonnell as Charles McVey. *Watts*, 492 So. 2d at 1285. Subsequent to being shot, McDonnell told a police officer that he had been shot by Charles McVey. *Id.* at 1286. At trial, the defendant argued that McDonnell's statements did not meet the requirements for a dying declaration. *Id.* at 1285.

[10] *Watts*, 492 So. 2d at 1287-89. The court reviewed the general requirements for admissibility of dying declarations: that the wounded person be *in extremis* and die after making the statement; that the person realize that he is mortally wounded and has no hope of recovery. *Id.* at 1287.

[11] 491 So.2d 837 (Miss. 1986).

[12] No. 56,287 (Miss. July 16, 1987).

[13] *Stringer*, 491 So. 2d at 840. Stringer was on trial for the murder of Nell McWilliams. She and her husband Ray McWilliams had been brutally murdered at their home. *Id.* at 838-39.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 841. The court found that the trial court had committed reversible error by allowing those portions of Stringer's former testimony which were not admissions. *Id.*

In a concurring opinion, Justice Robertson lamented the loss of an opportunity to render a decision on the meaning of the Mississippi Constitution that would continue the interpretation given the United States Constitution during the Warren era of Supreme Court decisions. Since the issue briefed on appeal was exclusion of the gun as fruit of a search conducted on a warrant possibly issued without probable cause, and not the issue of relevance, Justice Robertson would have addressed first the question of the exclusionary rule and decided it on state constitutional grounds which he construed to require exclusion where there is a good faith reliance by an officer upon an invalid warrant. *Id.* at 841-51 (Robertson, Jr., concurring).

[18] *Parker*, slip op. at 9-10. Mark Anthony Parker and two companions poured gas on

the former testimony of a witness, T.C. Carter, who was in Germany at the time of the second trial.[19] Likening the case to *Chambers v. Mississippi*, Justice Robertson pointed out that the Mississippi Rules of Evidence could not be applied to deny a defendant's right to due process.[20] Since Carter was unavailable, the court concluded that the transcript of his testimony came within the former testimony exception to hearsay and was admissible.[21] Once admitted, the former testimony was subject to impeachment, especially where the purpose was to place before the jury the confession, of someone else, to the crime charged under the indictment.[22]

Finally, in *Hemingway v. State*,[23] the Court noted that effective January 1, 1986, the Mississippi Rules of Evidence would no longer provide a res gestae exception to hearsay.[24]

Confessions

The admissibility of confessions was raised as an assignment of

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Darrell Jones during a fight. After Jones got back in his car, Parker threw a lighted match into the car. Jones died 16 days after the incident from severe burns. *Id.*, slip op. at 1-5.

[19] *Id.*, slip op. at 8-10. The first trial was declared a mistrial when the jury could not agree on a verdict. *Id.*, slip op. at 9.

At the second trial, Parker was not permitted to introduce a transcript from the first trial containing the testimony of Carter. Carter had bragged at a dance to Alicia Rainey that he had in fact been the person who threw the match. However, he recanted on the statement made at the dance and denied throwing the match. *Id.*, slip op. at 9. Carter's testimony on this point was impeached by Alicia Rainey. *Id.*

[20] *Id.*, slip op. at 11.

[21] *Id.*, slip op. at 11-12.

[22] *Id.*, slip op. at 12-15.

In a dissenting opinion, Justice Dan Lee and three other justices questioned the use of the former testimony exception because the unavailability of Carter was doubtful in light of testimony that Carter could have returned from West Germany if needed, and because the subpoena for Carter was not made part of the record and may not have even been shown to the lower court. Furthermore, the testimony of the eyewitnesses agreed on the point that Parker had indeed thrown the match that set the car and the victim on fire. The absence of the third party who supposedly confessed to the crime raised in the dissenters' minds the possibility of collusion between the defendant and the declarant. The girl to whom Carter declared his responsibility for the murder testified that Carter made the statement on March 7, 1983, yet the crime did not take place until April 26. The exclusion of the transcript of Carter's testimony and the following preclusion of his dance partner's testimony that he confessed were such a denial of due process, however, that the majority reversed Parker's conviction and remanded for another trial. *Id.*, slip op. at 1-8 (Dan Lee., J., dissenting).

[23] 483 So. 2d 1335 (Miss. 1986).

[24] *Id.* at 1337.

error in a number of cases during 1986.[25] In *Cabello v. State*[26] the Mississippi Supreme Court discussed the procedure to determine whether a confession was freely and voluntarily rendered.[27] The court emphasized that voluntariness is a prerequisite to the admissibility of a confession in the state's case-in-chief or for impeachment purposes.[28] A confession which is a product of "threats, physical mistreatment, or the promise of reward" is not voluntary.[29]

Seales v. State[30] provided the court with an opportunity to address the appellants' contention that their confessions were a product of an illegal arrest.[31] Although the court found sufficient probable cause for the arrest,[32] it noted that a confession obtained by an illegal arrest could nonetheless be admissible.[33]

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[25] Evans v. State, 499 So. 2d 781 (Miss. 1986); Irving v. State, 498 So. 2d 305 (Miss. 1986); White v. State, 495 So. 2d 1346 (Miss. 1986); Seales v. State, 495 So. 2d 475 (Miss. 1986); Page v. State, 495 So. 2d 436 (Miss. 1986); Moore v. State, 493 So. 2d 1301 (Miss. 1986); Kelly v. State, 493 So. 2d 984 (Miss. 1986); Cabello v. State, 490 So. 2d 852 (Miss. 1986); Trunnel v. State, 487 So. 2d 820 (Miss. 1986); Frost v. State, 483 So. 2d 1345 (Miss. 1986); Hemingway v. State, 483 So. 2d 1335 (Miss. 1986); Powell v. State, 483 So. 2d 363 (Miss. 1986); Brown v. State, 483 So. 2d 328 (Miss. 1986); Merrill v. State, 482 So. 2d 1147 (Miss. 1986).

[26] 490 So. 2d 852 (Miss. 1986).

[27] *Id.* at 856. Whether a confession was voluntarily rendered is a question which is resolved by the judge outside the hearing of the jury. *Id.* When the defendant challenges the voluntariness of a confession, the state has the burden of proving that it was in fact obtained freely and voluntarily. *Id.*; *see also* Agee v. State, 185 So. 2d 671, 673 (Miss. 1966)(once voluntariness of confession is questioned, state has burden of proving voluntariness by offering testimony of all officers present when confession was given and signed).

[28] *Cabello*, 490 So. 2d at 856. *See also* Ladner v. State, 231 Miss. 445, 450, 95 So. 2d 468, 470 (1957)(state should not be permitted to utilize confession not voluntarily obtained for any purpose).

[29] *Cabello*, 490 So. 2d at 856; Powell v. State, 483 So. 2d 363, 368 (Miss. 1986).

[30] 495 So. 2d 475 (Miss. 1986). Billy Gene Seales was arrested when a citizen identified Seales' vehicle as the one used to flee the scene of a robbery. *Id.* at 476. After being advised of his constitutional rights, Seales confessed to the robbery and implicated Brown. *Id.* Based upon this confession and statements of a witness, a warrant was issued for Brown's arrest. *Id.* While in custody, and after having been advised of his rights, Brown gave a statement to the authorities which mirrored the facts in Seales' confession. However, Brown's confession implicated Seales in the robbery. *Id.* Seales and Brown were tried together. *Id.* at 475.

[31] *Id.* at 476-78.

[32] *Id.*

[33] *Id.* at 477. The court cited its previous decision of Lockett v. State, 459 So. 2d 246 (Miss. 1984), wherein it stated:

> The Court in Brown v. Illinois, 442 U.S. 590 (1975) then set forth several factors which it regarded as critical to determining whether a confession obtained

In *Seales*, the court was also confronted with the question of whether the admission of the appellants' confessions denied them their constitutional right to confrontation since both confessions incriminated each appellant and neither appellant took the stand.[34] Citing *Brown v. State*,[35] the Mississippi Supreme Court noted that a confession of a codefendant which inculpates the defendant should not be admitted during the state's case-in-chief.[36] However, the court noted that *Ohio v. Roberts*[37] provided an exception to this rule where it could be demonstrated that the confessions evidenced the "particularized guarantees of trustworthiness."[38] Since the appellants' confessions were not conflicting, the court considered them trustworthy and therefore admissible during the state's case-in-chief.[39]

Another acceptable way to avoid a violation of a defendant's right to confrontation, where a codefendant's extrajudicial statement inculpates the defendant, was noted in *Evans v. State*.[40] In *Evans*, the Mississippi Supreme Court found the trial court's deletion of testimony which inculpated the defendant effective, although perhaps more restrictive than necessary.[41]

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by an illegal arrest was the product of free will. Those factors are: (1) The giving of Miranda warnings. (2) The temporal proximity of the arrest and confession. (3) The presence of intervening circumstances. (4) The purpose and flagrancy of the official misconduct. (5) Any other circumstances that seem relevant.

Seales, 495 So. 2d at 477. The court ultimately found that the arrest of both Seales and Brown was based on probable cause. *Id.* at 476-78. Nonetheless, it tracked the aforementioned requirements with the factual circumstances surrounding the confession and determined that it was freely and voluntarily given. *Id.*

[34] *Seales*, 495 So. 2d at 478. The right to confrontation of witnesses is guaranteed in Article 3, Section 26 of the Mississippi Constitution and the fourth and fourteenth amendments to the Untied States Constitution. *Seales*, 495 So. 2d at 476.

[35] 340 So. 2d 718 (Miss. 1976).

[36] *Seales*, 495 So. 2d at 478-79. *Brown* provided that if a codefendant's statements implicating the defendant are admitted, after the co-defendant takes the stand and is subject to cross-examination the jury must be given cautionary instruction. *Id.*; *see also* Burton v. United States, 391 U.S. 123, 126 (1968)(sixth amendment confrontation clause violated where codefendant's out-of-court statement inculpating defendant is introduced and co-defendant does not testify).

[37] 448 U.S. 56 (1980).

[38] *Seales*, 495 So. 2d at 479-81. The Mississippi Supreme Court cited a lengthy portion of *Ohio v. Roberts* wherein the United States Supreme Court discussed the operation of the confrontation clause. *Id.*

[39] *Id. Cf.* Mitchell v. State, 495 So. 2d 5, 6-11 (Miss. 1986)(out-of-court statements of co-defendants did not evidence guarantees of trustworthiness).

[40] 499 So. 2d 781 (Miss. 1986).

[41] *Id.* at 783-84. The court cited the Fifth Circuit opinion of Posey v. United States,

PHOTOGRAPHS

During 1986, the Mississippi Supreme Court was asked to consider the admissibility of photographs depicting the victims of a crime.[42] Consistent with its previous decisions in this area, the court noted that although a picture may be gruesome or unpleasant, this alone is insufficient to bar its admissibility.[43] Where a photograph is relevant[44] and its probative value substantially outweighs the danger of unfair prejudice, it should be admitted.[45] However, whether or not a photograph is admitted ultimately rests within the sound discretion of the trial court.[46]

The use of photographs and slides during closing argument came under attack in *Stringer v. State*.[47] James Michael Stringer was on trial for the brutal robbery-murder of Ray McWilliams.[48] At trial, the

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416 F.2d 545 (5th Cir. 1969), which provides that "[t]here is no error in the admission of a co-defendant's confession, if all references to the other defendants are deleted and there is no 'substantial threat' to the right of confrontation and cross-examination [citations omitted]." *Evans*, 499 So. 2d at 784.

[42] Parker v. State, No. 56,287 (Miss. July 16, 1986); Stringer v. State, 500 So. 2d 928, 934 (Miss. 1986); Simpson v. State, 497 So. 2d 424, 432-33 (Miss. 1986); Cooley v. State, 495 So. 2d 1362, 1364 (Miss. 1986); Hunter v. State, 489 So. 2d 1086, 1089 (Miss. 1986); Watson v. State, 483 So. 2d 1326, 1328 (Miss. 1986). *Cf.* Holmes v. State, 483 So. 2d 684, 687-88 (Miss. 1986).

[43] *See supra* note 42. Previous court decisions which set forth this proposition are Cabello v. State, 471 So. 2d 332, 341 (Miss. 1985), *cert. denied*, 106 S. Ct. 2291 (1986); Cardwell v. State, 461 So. 2d 754, 759-60 (Miss. 1984); Dase v. State, 356 So. 2d 1179, 1181 (Miss. 1978).

[44] Rule 401 of the Mississippi Rules of Evidence defines 'Relevant Evidence' as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MISS. R. EVID. 401. A prerequisite to the admissibility of evidence is that it is relevant. However, not all relevant evidence is admissible. The Mississippi Rules of Evidence provide: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible." MISS. R. EVID. 402.

[45] *See supra* note 42. See MISS. R. EVID. 401-403 concerning admissibility of photographs. In particular, consider MISS. R. EVID. 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

[46] *See supra* note 42.

[47] 500 So. 2d 928 (Miss. 1986).

[48] *Id.* at 931. On June 21, 1982, James Michael (Jimbo) Stringer and several other individuals entered the home of Nell and Ray McWilliams with the intent to rob and kill the couple. Their entry into the home was resisted by Ray McWilliams who was shot and killed in the struggle. *Id.* at 931-32.

prosecutor introduced photographs and slides of Mrs. McWilliams, who had also been ruthlessly murdered, in an effort to establish Stringer's role as the "silencer."[49] Although the court did not find introduction of the pictures or slides at the trial of Ray McWilliams to be reversible error,[50] it concluded that their relevancy in closing arguments was suspect and their use was intended to inflame and prejudice the jury.[51]

The holding of *Stringer* appears only to reach the use of photographs or slides of "other victims" during closing argument. However, the court may not have intended such a narrow reading.[52] Therefore, prosecutors should carefully consider the use of victim pictures in closing argument which might tend to inflame or prejudice jurors.

Evidence of Other Crimes

The Mississippi Supreme Court was confronted with a number of criminal cases where the appellant argued that the trial court had committed reversible error in permitting the state to introduce evidence of "other crimes."[53] The general rule is that "evidence of prior offenses

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[49] *Id.* at 933-34. Nell McWilliams was killed by a shotgun blast to the back of her head after she had apparently witnessed the execution of her husband, Ray McWilliams. *Id.*

[50] *Id.* at 934.

[51] *Id.* at 934-35. The court ultimately concluded that the prosecutor's "slide show" during closing arguments in conjunction with his "last chance" plea for retribution on behalf of the McWilliams' denied Stringer a fair sentencing trial. *Id.*

Justice Robertson, concurring in part and dissenting in part, would have reversed both the conviction and sentence and remanded for a new trial. This determination was primarily based upon the fact that the introduction of the photographs of Nell McWilliams' body were completely irrelevant to the guilt or innocence of Stringer in his trial for the murder of Ray McWilliams. *Id.* at 947-52 (Robertson, J., concurring).

[52] *Id.* at 934-35. In its discussion of the use of victim photographs, the court made reference to State v. Clawson, 270 S.E.2d 659 (W. Va. 1980). In that case, the West Virginia Supreme Court determined that the use of victim photographs in closing arguments during either the guilt or sentencing phase was reversible error. *Clawson*, 270 S.E.2d at 674. The Mississippi Supreme Court found the rationale of *Clawson* persuasive and stated, "As the West Virginia court noted in *Clawson*, the effect [of utilizing victim picture during closing argument] is to take the pictures far beyond their evidentiary value and use them as a tool to inflame the jury." *Stringer*, 500 So. 2d at 935.

[53] Temple v. State, 498 So. 2d 379, 380-81 (Miss. 1986); Usry v. State, 498 So. 2d 373, 375-76 (Miss. 1986); Robinson v. State, 497 So. 2d 440, 442 (Miss. 1986); Brown v. State, 495 So. 2d 508, 509 (Miss. 1986); Mariche v. State, 495 So. 2d 507, 507-08 (Miss. 1986); Thomas v. State, 495 So. 2d 481, 483-85 (Miss. 1986); Coates v. State, 495 So. 2d 464, 468 (Miss. 1986); Lightsey v. State, 493 So. 2d 375, 379-80 (Miss. 1986); Graves v. State, 492 So. 2d 562, 563-65 (Miss. 1986); Cabello v. State, 490 So. 2d 852, 856-57 (Miss. 1986); Bolin v. State, 489 So. 2d 1091, 1092 (Miss. 1986); Horne v. State, 487 So. 2d 213,

committed by a defendant, not resulting in a conviction, is generally inadmissible either for impeachment purposes or as part of the State's case-in-chief."[54] However, the Mississippi Supreme Court has recognized a number of exceptions to this rule.[55] Where the factual situation fits within one of the enumerated exceptions, the assignment of error is meritless.[56] This simple analysis should enable an attorney to evaluate

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214-15 (Miss. 1986); Gates v. State, 484 So. 2d 1002, 1009 (Miss. 1986); Brown v. State, 483 So. 2d 328, 330 (Miss. 1986); Collins v. State, 482 So. 2d 1112, 1112 (Miss. 1986); Minor v. State, 482 So. 2d 1107, 1110-11 (Miss. 1986); Griffin v. State, 482 So. 2d 233, 233-34 (Miss. 1986).

[54] Neal v. State, 451 So. 2d 743, 758 (Miss. 1984).

Mississippi Rule of Evidence 404(b), effective January 1, 1986, provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MISS. R. EVID. 404(b).

[55] Griffin v. State, 482 So. 2d 233, 233 (Miss. 1986). In *Griffin*, the court enumerated the exceptions recognized by Mississippi caselaw concerning the admissibility of evidence of other crimes. Those exceptions are:

> (1) Where the offense charged and that offered to be proved are so connected as to constitute one transaction; (2) where it is necessary to identify the defendant; (3) where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged; (4) where the accusation involves a series of criminal acts which must be proved to make out the offense; or (5) where it is necessary to prove scienter or guilty knowledge.

Id; *see also* Usry v. State, 498 So. 2d 373, 375-76 (Miss. 1986)(listing exceptions to general rule concerning admissibility of evidence of other crimes).

[56] *See, e.g.*, Temple v. State, 498 So. 2d 379, 380-81 (Miss. 1986)(witness never called to testify concerning other crimes); Robinson v. State, 497 So. 2d 440, 442-43 (Miss. 1986)(evidence of other crime so closely related to charged offense as to form single transaction); Brown v. State, 495 So. 2d 508, 509 (Miss. 1986)(evidence of other offense elicited during defendant's cross-examination of witness); Mariche v. State, 495 So. 2d 507, 507-08 (Miss. 1986)(evidence of flight after pursuit by authorities admissible to show guilty knowledge); Thomas v. State, 495 So. 2d 481, 483-85 (Miss. 1986)(evidence of other crime admissible since it was integrally related in time, place and fact with charged crime); Coates v. State, 495 So. 2d 464, 465 (Miss. 1986)(evidence of prior sexual crimes admissible when substantially similar in nature to the crimes charged and performed with the same individual); Lightsey v. State, 493 So. 2d 375, 379-80 (Miss. 1986)(fingerprint exemplars taken prior to commission of crime admissible to prove identify of defendant); Graves v. State, 492 So. 2d 562, 564 (Miss. 1986)(evidence of other crimes admissible to prove identity of defendant); Horne v. State, 487 So. 2d 213, 14-15 (Miss. 1986)(evidence of other crimes not reversible, judge used curative measures); Brown v. State, 483 So. 2d 328, 329-30 (Miss. 1986)(evidence that arrest made pursuant to police warrant admissible to present complete story to jury); Collins v. State, 482 So. 2d 1112, 1112 (Miss. 1986)(evidence of other crime constituted same transaction or oc-

the merit of this assignment of error and frame a persuasive argument on behalf of his client.[57]

Identification of Accused

The Mississippi Supreme Court was asked to render an opinion in several cases concerning the identification of an accused defendant.[58] In *Thompson v. State*,[59] the court was asked whether an allegedly suggestive pretrial viewing of an accused violated his sixth amendment right to counsel.[60] Thompson had been arrested and indicted for the robbery of a drug store.[61] The day after Thompson's arraignment, Jim Busby, the owner of the drug store who was present at the robbery, walked into the detention area and identified Thompson.[62] When Busby identified Thompson as the robber at trial, Thompson requested that this portion of Busby's testimony be excluded. Thompson argued that the "viewing" at the jail violated his sixth amendment rights.[63]

On appeal, the Mississippi Supreme Court acknowledged the *Wade/Gilbert* doctrine[64] but found it inapplicable. The court noted

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currence); Minor v. State, 482 So. 2d 1107, 1110-11 (Miss. 1986)(same). *But cf.* Usry v. State, 498 So. 2d 373, 375-76 (Miss. 1986)(evidence of wholly unrelated crime not within recognized exceptions, reversible error); Cabello v. State, 490 So. 2d 852, 857 (Miss. 1986)(evidence of other crimes not within recognized exception; yet no reversible error because jury instructed to disregard testimony); Bolin v. State, 489 So. 2d 1091, 1091-92 (Miss. 1986)(introduction of unlawful substances not mentioned in indictment reversible error); Griffin v. State, 482 So. 2d 233, 233-34 (Miss. 1986)(evidence of separate crime reversible error where no exception to general rule exists).

[57] Usry v. State, 498 So. 2d 373, 375-76 (Miss. 1985). In *Usry*, the court applied the plain error rule, Miss. Sup. Ct. R. 6(b), where defense counsel failed to raise the introduction of evidence of other crimes as an assignment of error on appeal. *Usry*, 498 So. 2d at 376.

[58] Ray v. State, 503 So. 2d 222 (Miss. 1986); Arteigapiloto v. State, 496 So. 2d 681 (Miss. 1986); Foster v. State, 493 So. 2d 1304 (Miss. 1986); Smith v. State, 492 So. 2d 260 (Miss. 1986); Thompson v. State, 483 So. 2d 690 (Miss. 1986).

[59] 483 So. 2d 690 (Miss. 1986)

[60] *Id.* at 690-92.

[61] *Id.* at 690-91. On September 25, 1982, a drug store was robbed by a white male armed with a pistol. *Id.* Five months later, Thompson was arrested and indicted for the offense. *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 691. The *Wade/Gilbert* doctrine evolved from two United States Supreme Court decisions, United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967). *Thompson*, 483 So. 2d at 691. The *Wade/Gilbert* doctrine provides that a defendant has a right to have counsel present at any line-up or show-up since it is a critical stage of the criminal proceedings. *Id.*

that before a defendant can contend that his right to counsel has been violated he must establish that state action is involved.[65] In Thompson's case, the court found no evidence of state involvement.[66] The record revealed that Busby frequently visited the jail and often went into the cell area.[67] Furthermore, there was no evidence that Busby even knew Thompson was being held in the jail.[68] The court's other decisions in this area focused on whether the method utilized to identify the accused was "impermissibly suggestive."[69] *Foster v. State*[70] represented an extreme case of a suggestive identification procedure. There, the court reprimanded local authorities for their line-up procedure where the defendant was the only participant in the line-up wearing a distinctive hat mentioned by the victim.[71]

EXPERTS

In *Henry v. State*,[72] the court clarified that it is not necessary for an individual to be "infallible or possess the highest degree of skill" within a particular area in order to testify as an expert witness.[73] The primary concern is that the person "possess peculiar knowledge or information regarding the relevant subject matter which is not likely to

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[65] *Thompson*, 483 So. 2d at 691-92. The sixth amendment rights which are part of the due process of law guaranteed by the fourteenth amendment do not apply to independent actions of private citizens. *Id.*

[66] *Id.* The court found analogous the factual situation in Untied States v. Thevis, 665 F.2d 616 (11th Cir.), *cert. denied*, 456 U.S. 1008 (1982), where the Eleventh Circuit concluded that an inadvertent encounter did not trigger the defendant's sixth amendment rights absent a showing that the prosecutor staged the encounter. *Thompson*, 483 So. 2d at 691-92.

[67] *Thompson*, 483 So. 2d at 691-92.

[68] *Id.* Proof that the state arranged the encounter between Busby and Thompson was absent. Thus, the court concluded that Busby's in-court identification of Thompson was in no way tainted. *Id.*

[69] *See supra* note 58.

[70] 493 So. 2d 1304 (Miss. 1986).

[71] *Id.* at 1305-06. The court did not find that the line-up constituted reversible error. *Id.* The court reasoned that although the line-up was suggestive, there was not a very substantial likelihood of irreparable misidentification by the witness. *Id.*

[72] 484 So. 2d 1012 (Miss. 1986). In *Henry*, the defense sought to introduce the testimony of a handwriting expert. *Id.* at 1014. After voir dire on the expert's qualifications, the trial court refused to permit her to testify. *See also* Hooten v. State, 492 So. 2d 948, 948-49 (Miss. 1986)(although individual lacked formal educational background in handwriting analysis, she had sufficient practical experience to qualify as expert).

[73] Hooten v. State, 492 So. 2d 948, 948 (Miss. 1986); Henry v. State, 484 So. 2d 1012, 1015 (Miss. 1986).

be possessed by laymen."[74] If this criterion is satisfied, the individual should be permitted to testify, leaving questions of credibility to be resolved by the jury.[75]

Conspiracy

The Mississippi Supreme Court was confronted with two questions: whether a jury's verdict of guilty for conspiracy was against the overwhelming weight of the evidence,[76] and the admissibility of statements made by co-conspirators.[77]

In discussing the proof necessary to establish a conspiracy, the court noted the linchpin in a conspiracy is that "there must be recognition on the part of the conspirators that they are entering into a common plan and knowingly intend to further its common purpose."[78] The state must produce sufficient evidence in this regard in order to sustain the verdict of the jury.[79]

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[74] *See supra* note 73.

[75] *Id.* In *Hooten*, Justice Hawkins submitted a lengthy dissent focusing upon the question of whether the trial court abused its discretion in not permitting the defendant's "expert" to testify. *Hooten*, 492 So. 2d at 949-58 (Miss. 1986).

[76] McCray v. State, 486 So. 2d 1247, 1251-52 (Miss. 1986). Johnny McCray was arrested by narcotics agents along with two companions at the Jackson Airport after a drug-detecting dog reacted to his suitcase. *Id.* at 1248-49. McCray was indicted on a charge of conspiracy to sell marijuana. *Id.* at 1249. Bernard Lucas was one of the individuals arrested with McCray. *Id.* at 1248. *Lucas v. State* was disposed of and controlled by *McCray*. Lucas v. State, 486 So. 2d 1253, 1255 (Miss. 1986). Ernie Davis was arrested along with Linda Banks when they attempted to pick up a package containing twenty-seven grams of heroin at the Jackson Airport. Davis v. State, 485 So. 2d 1055, 1056-57 (Miss. 1986). Davis was indicted and found guilty of conspiracy to possess heroin. *Id.*

[77] Mitchell v. State, 495 So. 2d 5, 6 (Miss. 1986). George Mitchell and Joyce Wells were arrested by authorities after it was discovered that the two were conspiring to have Joyce Wells' husband murdered. *Id.* at 6-7. This plot was made known to authorities by Clardy "Bootsie" Ellis. Mitchell had contacted Ellis in order to secure the services of a hired killer. *Id.* Ellis notified the Warren County sheriff. He was subsequently wired for sound and permitted to meet with Mitchell. Based upon Ellis' conversations, both Mitchell and Wells were taken into custody. *Id.*

[78] *McCray*, 486 So. 2d at 1251; *Davis*, 485 So. 2d at 1056-58. In both *McCray* and *Davis*, the court cited McDonald v. State, 454 So. 2d 488 (Miss. 1984). *McDonald* provides an authoritative discussion on conspiracy. *McDonald*, 454 So. 2d at 491-95. *See also* Miss. Code Ann. § 97-1-1 (1972).

[79] *See supra* note 3. Proof of conspiracy is generally established by circumstantial evidence. *McCray*, 486 So. 2d at 1251. However, absent evidence of

> purposeful, behavior, mere presence at the scene of the crime, even when coupled with knowledge that a crime is being committed, is insufficient to establish membership in a conspiracy; and mere association with conspirators is similarly insufficient. There must be exist some evidence that a defendant has

Whether a statement made by a co-conspirator is admissible is dependent upon whether such a statement was made in the furtherance of the conspiracy.[80] In *Mitchell v. State*,[81] the court examined the out-of-court statements of two co-conspirators.[82] The court concluded that statements made subsequent to the conspirator's arrest did not come within the hearsay exception,[83] while those made prior to such arrest would be admissible.[84]

Ineffective Assistance of Counsel and Prosecutorial Misconduct

In 1986, the Mississippi Supreme Court handed down several decisions addressing problems with attorneys, primarily involving issues of ineffective assistance of counsel,[85] prosecutorial misconduct,[86] and others.[87] Some cases were submitted to the court by a motion to set

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associated himself with the venture in some fashion, participated in it as something that he wishes to bring about, or sought by his actions to make succeed [citations omitted].

Davis, 485 So. 2d at 1058.

[80] Mitchell v. State, 495 So. 2d 5, 9, 11-12 (Miss. 1986).

Effective January 1, 1986, the Mississippi Rules of Evidence concerning statements made during a conspiracy provide: "A statement is not hearsay if . . . the statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Miss. R. Evid. 801(d)(2)(E).

The adoption of Rule 801(d)(2)(E) does not alter Mississippi law concerning a statement by a co-conspirator. *Mitchell*, 495 So. 2d at 11.

[81] 495 So. 2d 5 (Miss. 1986).

[82] *Id.* at 10-13.

[83] *Id.* Statements made after an arrest are no longer in furtherance of the conspiracy since the conspiracy has been terminated by the arrest. *Id.*

[84] *Id.*

[85] *See, e.g.*, Odom v. State, 498 So. 2d 331 (Miss. 1986); Smith v. State, 490 So. 2d 860 (Miss. 1986); Perkins v. State, 487 So. 2d 791 (Miss. 1986); Evans v. State, 485 So. 2d 276 (Miss. 1986); Stringer v. State, 485 So. 2d 274 (Miss. 1986); Coleman v. State, 483 So. 2d 680 (Miss. 1986); Tokman v. State, 482 So. 2d 241 (Miss. 1986).

[86] *See, e.g.*, Stringer v. State, 800 So. 2d 928 (Miss. 1986)(discussed *infra* notes 29-46 and accompanying text); Melton v. State, 498 So. 2d 372, 372 (Miss. 1986)(defendant's allegations without merit that prosecutor improperly commented upon defendant's failure to call certain witnesses); Simpson v. State, 497 So. 2d 424, 427-28 (Miss. 1986)(conviction for murder reversed where prosecutor improperly commented upon defendant's failure to call wife to testify).

[87] *See, e.g.*, Killingsworth v. State, 490 So. 2d 849, 850 (Miss. 1986)(motion by court-appointed attorney to withdraw from representation of defendant on appeal); Cook v. State, 483 So. 2d 371, 376 (Miss. 1986)(conviction of attorney for indirect contempt of court reversed; attorney's due process rights violated where chancellor acted as prosecutor and judge).

aside the judgment and sentence,[88] pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act.[89] The Act specifies certain pleading requirements[90] that must be complied with, and failure to do so results in denial of any relief.[91] Where the claim of ineffective assistance of counsel cannot be decided from the face of the record, an evidentiary hearing is proper.[92]

In determining whether a defendant is entitled to relief under the Act, the court applies the two-prong test of *Strickland v. Washington*[93] to cases alleging ineffective assistance of counsel. *Strickland* requires the defendant to show that the attorney's performance was deficient and that such deficiency prejudiced the defense.[94] Applying the *Strick-*

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[88] *Smith*, 490 So. 2d at 860; *Perkins*, 487 So. 2d at 792; *Evans*, 485 So. 2d at 279-80; *Stringer*, 485 So. 2d at 274; *Tokman*, 482 So. 2d at 241.

[89] MISS. CODE ANN. §§ 99-39-1 to -29 (Supp. 1986). The stated purpose of the Act is:

> to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences.

Id. at § 99-39-3(1). One of the most significant provisions of the Act allows a defendant to "raise objections, defenses, claims, questions, issues, or errors," even though it could have been determined at trial or appeal and thus would normally be considered waived. *Id.* at § 99-39-21(1). However, the court may grant relief from the waiver only "upon a showing of cause and actual prejudice." *Id.* To establish "cause," the defendant must prove that "the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal." *Id.* at § 99-39-21(4). "Actual perjudice" is proved if the error "would have actually adversely affected the ultimate outcome of the conviction or sentence." *Id.* at § 99-39-21(5).

[90] *Id.* at § 99-39-9(1).

[91] *See Smith*, 489 So. 2d at 860 (failure to include affidavits supporting allegations as required by MISS. CODE ANN. § 99-39-9(1)(e) bars relief).

[92] *See Tokman*, 482 So. 2d at 241 (defendant's motion for leave to proceed in trial court granted where issue of ineffective assistance of counsel could not be resolved from record).

[93] 466 U.S. 668 (1984). *See, e.g., Perkins*, 487 So. 2d at 793 (discussion of *Strickland* factors); *Evans*, 485 So. 2d at 281 (same).

[94] *Strickland*, 466 U.S. at 687. The United States Supreme Court ruled in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the

land test, the court ruled in *Perkins v. State*[95] that the defendant was not denied effective assistance of counsel where only "tactical errors and other minor lapses" on the part of counsel were shown.[96]

The court also applied the *Strickland* test in three cases alleging ineffective assistance of counsel on the basis of erroneous advice from the attorney.[97] In *Coleman v. State*,[98] the defendant contended that his guilty plea to armed robbery was involuntary due to erroneous advice of counsel.[99] Defendant Coleman claimed that in agreeing to plead guilty he relied on his counsel's advice that he would be eligible for earned good time and could be released after seven years of imprisonment.[100] However, pursuant to an opinion of the Mississippi Attorney General, the administrative policy of the Mississippi Department of Corrections was changed, and Coleman was thereby required to serve a minimum of ten years.[101] The court noted that at the time the defendant entered the guilty plea the attorney's advice was correct based on the prevailing practice of the Department of Corrections.[102] Notwith-

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result unreliable.

Id.

[95] 487 So. 2d 791 (Miss. 1986). In *Perkins*, the defendant sought relief from a conviction of grand larceny and a sentence of five years imprisonment as a recidivist without pardon or parole. *Id.*

[96] *Id.* at 793. The court also held that failure of counsel to raise a totally meritless claim that the indictment was insufficient did not constitute ineffective assistance of counsel. *Id.* at 792.

[97] *See Odom*, 498 So. 2d at 332 (defendant entered plea of guilty to murder on advice of counsel that he might otherwise face death penalty); *Evans*, 485 So. 2d at 278 (defendant pled guilty to capital murder on advice of counsel that all evidence of murder and of premeditation would be excluded from sentencing hearing); *Coleman*, 483 So. 2d at 681 (defendant's guilty plea to armed robbery based on attorney's advise as to earned good time).

[98] 483 So. 2d 680 (Miss. 1986).

[99] *Id.*

[100] *Id.* at 681. On his plea of guilty, Coleman was sentenced to 15 years imprisonment. *Id.* at 680.

[101] *Id.* at 681. At the time Coleman entered his guilty plea, two statutory provisions precluded earned good time for prisoners convicted of armed robbery. First, MISS. CODE ANN. § 47-5-139(7) (1972) prohibited release for earned good time until the prisoner was eligible for parole. Second, MISS. CODE ANN. § 47-7-3(d) (1972) denied parole for any person convicted of robbery or attempted robbery. *Coleman*, 483 So. 2d at 681. Despite these statutory provisions, the Mississippi Department of Corrections nevertheless allowed good time for prisoners convicted of armed robbery. *Id.* The Attorney General's opinion ordered a change in this policy effective January 5, 1981, which required that persons convicted of armed robbery be denied good time for credit. *Id.*

[102] *Coleman*, 483 So. 2d at 682. "[N]o inquiry need be made into the qual ty of counsel's advice. It is sufficient that the advice has subsequently been established as wrong in substantial particulars." *Id.* at 683.

standing, the court ruled that the defendant was entitled to an evidentiary hearing[103] to determine if the guilty plea was "knowingly and willingly entered with knowledge of the gravamen of his plea and its consequences."[104] Most importantly, the court expressly extended the *Strickland* test to challenges to guilty pleas based on allegations of ineffective assistance of counsel.[105]

In one murder case, subsequent decisions altered the applicable law from that existing at the time the defendant entered a guilty plea.[106] The defendant's decision to plead guilty was based upon his attorney's advice that the death penalty could be imposed if he proceeded with the new trial he had been granted.[107] At the time the defendant entered his guilty plea, the attorney's advice was correct.[108] However, subsequent decisions[109] ruled that the double jeopardy clause precluded the imposition of the death penalty where the defendant had previously been sentenced to life imprisonment for the same crime,[110] thereby rendering the attorney's prior advice erroneous. Defendant Odom argued that his guilty plea should be set aside on the basis of his attorney's erroneous advice.[111] The Mississippi Supreme Court denied relief, reasoning that the defendant's plea was voluntary at the time it was entered and that future decisions which render advice erroneous in retrospect should not vitiate a voluntary guilty

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[103] *Id.* at 684.

[104] *Id.* at 682.

[105] *Id.* at 683. In such a context, the court stated that the *Strickland* test requires the defendant to show that the attorney's advice fell short of the objective level of competence required of criminal attorneys, and that, but for the attorney's erroneous advice, the defendant would have gone to trial instead of pleading guilty. *Id.*

[106] Odom v. State, 498 So. 2d 331 (Miss. 1986). In *Odom*, the defendant was charged with capital murder while engaged in the commission of armed robbery. The jury returned a verdict of the lesser-included offense of murder. The defendant was granted a new trial, but then pled guilty to murder and was sentenced to life imprisonment. *Id.* at 332.

[107] *Id.* at 332.

[108] *Id.* at 333. The defendant entered his guilty plea in 1978. At that time, two cases represented the state of the law in Mississippi: Butler v. State, 177 Miss. 91, 170 So. 148 (1936), and Jones v. State, 144 Miss. 52, 109 So. 265 (1926). *Odom*, 498 So. 2d at 333. These cases established that "only an actual acquittal or actual conviction raised double jeopardy implication." *Id.* If the defendant received only an implied or constructive acquittal or conviction, then no double jeopardy problems were raised in a second trial. *Id.*

[109] Bullington v. Missouri, 451 U.S. 430 (1981); Dycus v. State, 440 So. 2d 246 (Miss. 1983)(adopting the United States Supreme Court decision in *Bullington*).

[110] *Odom*, 498 So. 2d at 332.

[111] *Id.*

plea.[112]

In one of the most ruthless and brutal murder cases in Mississippi history, the Mississippi Supreme Court was forced to reverse a death sentence for the murder of Ray McWilliams and remand for a new sentencing trial due to prosecutorial misconduct.[113] The court held that the combined effect of the prosecutors' argument and trial tactics "was sufficient to inflame and prejudice the jury in its deliberation on the death penalty," thereby violating defendant's right to a fair trial.[114] In conjunction with other errors,[115] the prosecutor committed three preju-

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[112] *Id.* at 333-34. For a similar decision, see Evans v. State, 485 So. 2d 276 (Miss. 1986). In *Evans*, the court denied relief from a guilty plea to capital murder and a sentence of death. *Evans*, 485 So. 2d at 282. Defendant Evans alleged that his attorney's erroneous recommendations to plead guilty, upon which the defendant relied, deprived defendant of his right to effective assistance of counsel. *Id.* at 278. Defendant contended that counsel recommended a guilty plea, based on his understanding of Coleman v. State, 378 So. 2d 640 (Miss. 1979). *Evans*, 485 So. 2d at 278. Defendant claimed that "[i]t was counsel's understanding that the State's case would be limited at the penalty phase only to evidence relevant to the eight (8) enumerated statutory aggravating circumstances and that, on a guilty plea, he could exclude all evidence of the crime and of premeditation from the penalty hearing." *Id.* The court noted that defendant Evans had an opportunity to raise the issue of ineffective assistance of counsel in a prior petition for writ or error *coram nobis*. *Id.* at 280. Nevertheless, assuming *arguendo* that defendant was entitled to pursue relief under the Post-Conviction Collateral Relief Act, the court addressed the issue whether the *Strickland* test had been satisfied and concluded that it had not been met. *Id.* at 281-82. The court determined that counsel's interpretation of the law at the time defendant entered the guilty plea was reasonable and supported by precedent. *Id.* at 282. Additionally, the court held that the guilty plea was voluntary at the time it was entered. *Id.* The court noted that "a verdict of guilty supported by confessions and direct evidence comes out more strongly against a claim of ineffectiveness of counsel." *Id.* at 281.

[113] Stringer v. State, 500 So. 2d 928 (Miss. 1986). In *Stringer*, the evidence established that defendant James Michael (Jimbo) Stringer and several others entered the home of Ray and Nell McWilliams with the intent to rob and kill the couple. *Id.* at 930. Ray McWilliams put up a struggle, but was shot and killed. *Id.* Immediately thereafter defendant Jimbo Stringer, seeing Nell McWilliams attempting to crawl away, put a shotgun to the back of Nell's head and pulled the trigger. *Id.* The blast blew Nell's head off, splattering fragments of her skull and brain across the room, and killing her instantly. *Id.* Stringer was convicted of the murder of Nell McWilliams and was sentenced to life imprisonment. *Id.* Stringer was then tried and convicted of the capital murder of Ray McWilliams, which the Mississippi Supreme Court affirmed. *Id.* However, due to prosecutorial misconduct, the death penalty imposed for the murder of Ray McWilliams was reversed and new sentencing trial ordered. *Id.*

[114] *Id.* at 930.

[115] *Id.* at 930-31. Other errors which the court cited as requiring reversal included:

> (1) the introduction into evidence of photograhs of the body of Nell McWilliams . . .
>
> (2) The display to the jury, during closing argument, of color slides of the body

dicial errors in closing arguments.[116] First, the prosecutor attempted to extract a promise from the jury to return the death penalty. During voir dire, the prosecutor asked the jurors if they could return the death penalty under certain conditions.[117] Then, during closing arguments, the prosecutor reminded the jurors of their "promise" under oath that they could return the death penalty in the proper case.[118] The courrt noted that the prosecutor's conduct was not "*per se* reversible."[119] However, the court reaosned that the prosecutor's conduct was sufficient to mistakenly lead the jurors to believe that they had promised to ignore any mitigating factors.[120] The court held such conduct required reversal, ruling that "[i]t is an improper influence to put the jury in a 'box' by voir dire tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant."[121] Second, during closing arguments, the prosecutor referred to the fact that the jury in the prior trial for the simultaneous murder of Nell McWilliams had only returned a sentence of life imprisonment.[122] The prosecutor made a "last chance" argument to the jury to return the death penalty for the murder of Ray McWilliams.[123] The court held that such arguments could have improperly influenced the jury to return the death penalty for the murder of Nell McWilliams, a crime for which defendant Stringer had already been sentenced, rather than returning an independent and un-

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of Nell McWilliams.

(3) The state's attempt to prevent Stringer from calling John Mack Parker as a witness.

Id.

[116] *Id.* at 938-39.

[117] *Id.* at 938. The conditions posed to the jurors included whether they could return the death penalty if the defendant did not pull the trigger himself to kill the victim. *Id.* Obviously, the prosecutor asked this question since Stringer did not actually fire the shot which killed the person he was being prosecuted for, namely Ray McWilliams.

[118] *Id.*

[119] *Id.* The court cited the rule laid down in West v. State, 485 So. 2d 681 (Miss. 1985) and Murphy v. State, 246 So. 2d 920 (Miss. 1971) that "it is reversible error to ask a juror during voir dire to commit to returning a particular verdict." *Stringer*, 500 So. 2d at 938. However, the court concluded that the prosecutor in *Stringer* had not *specifically* requested a verdict during voir dire. *Id.*

[120] *Stringer*, 500 So. 2d at 938. The mitigating factors which the defendant was entitled to have considered included: the fact that the defendant himself did not pull the trigger to kill Ray McWilliams, the defendant's age, high school record, troubled home life, and his father's dominating personality. *Id.*

[121] *Id.* at 938-39.

[122] *Id.* at 939.

[123] *Id.* The prosecutor challenged the jurors: "But, please forgive me, this is my last chance. This is the state of Mississippi's last chance. This is the relatives of the McWilliams last chance for retribution." *Id.*

biased verdict for the killing of Ray McWilliams.[124] Lastly, the prosecutor compared the defendant's right not to testify to a particular witness's right to invoke the attorney-client privilege.[125] The court classed the prosecutor's comments as "highly suspect,"[126] and ruled that, although the remarks standing alone did not deprive the defendant of a fair trial,[127] when combined with the other errors it "created such an atmosphere of bias, passion, and prejudice that they effectively denied Jimbo Stringer a fundamentally fair trial in the sentencing phase."[128] The court expressed great dissatisfaction in reversing a sentence for a crime which demanded the "severest punishment by law."[129] However, the court reiterated the responsibility of ensuring a fair and impartial trial to all defendants, and admonished judges and attorneys to fulfill that obligation.[130]

The Mississipi Supreme Court also addressed the issue of an attorney's right to withdraw from representation of a defendant,[131] and concluded that the Mississippi Constitution requires a higher standard to allow withdrawal[132] than that formulated by the United States Supreme Court in *Anders v. California*.[133] The court reasoned that, pur-

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[124] *Id.*

[125] *Id.* at 940.

[126] *Id.* at 941.

[127] *Id.*

[128] *Id.* at 939.

[129] *Id.* at 930.

[130] *Id.* The court stated "we admonish all prosecutors, trial judges, and other affected officials to follow the rules and provide a fundamentally fair hearing at the sentencing (death penalty) phase, or be prepared to 'do it again'." *Id.* The court further commented "[w]e all owe a duty to the taxpayers of this state to give criminal defendants a full and complete trial the first time around." *Id.* at 931. The court continued: "We would urge trial judges, prosecutors, and defense attorneys to read and carefully consider this opinion . . . . We intend to abide by our duty . . . ." *Id.*

[131] Killingsworth v. State, 490 So. 2d 849 (Miss. 1986).

[132] *Id.* at 850.

[133] 386 U.S. 738 (1967). In *Anders*, the United States Supreme Court laid out a procedure whereby an attorney, convinced after a conscientious examination that an appeal for his client is meritless, could seek withdrawal from representation without impairing his client's federal constitutional rights. *Id.* at 744. *Anders* requires that the attorney file a brief with the appellate court "referring to anything in the record that might arguably support the appeal," and requesting permission of the court to withdraw. *Id.* The attorney must provide a copy of the brief to the client and allow the client time to raise any points he desires. *Id.* The Mississippi Supreme Court opined that the *Anders* procedure reduced the status of the attorney seeking withdrawal from that of advocate to amicus curiae. *Killingsworth*, 490 So. 2d at 851. Thus, in the Mississippi Supreme Court's view, the *Anders* procedure, standing alone, would compromise the rights under Mississippi law of an indigent defendant to appeal. *Id.*

suant to section 99-35-101 of the Mississippi Code,[134] all persons convicted of an offense in the circuit courts of this state may appeal *as of right* to the Mississippi Supreme Court.[135] The court held that, upon motion, withdrawal from representation will be granted where good cause is shown.[136] However, the court ruled that "conscientious and diligently formed opinion by counsel that the appeal is without merit" does not constitute good cause.[137]

Instructions to Jury

The decisions by the Mississippi Supreme Court in 1986 involving jury instructions were typical of the kinds of questions normally faced by the court. In addition to the cases discussed hereinafter, the court also addressed the following issues: instruction that guilt may be inferred from flight,[138] proper use of the *McDaniel* Rule,[139] "conspiracy" language to connote criminal conduct as accessory before the fact,[140]

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[134] "Any person convicted of an offense in circuit court may appeal to the supreme court, provided, howver, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty." Miss. Code Ann. § 99-35-101 (1972).

[135] *Killingsworth*, 490 So. 2d at 850. The court noted that if an indigent defendant chooses to pursue his statutory right to appeal he may proceed *in forma pauperis* and is entitled to appointed counsel to represent his appeal. *Id.* The court further noted that the Mississippi Constitution art. 3, § 26 "guarantees to an accused 'a right to be heard by himself or counsel, or both'." *Killingsworth*, 490 So. 2d at 851.

[136] *Killingsworth*, 490 So. 2d at 851.

[137] *Id.*

[138] *See* Lightsey v. State, 493 So. 2d 375, 380 (Miss. 1986)(conviction of burglary reversed based on erroneous granting of flight instruction where such instruction had no basis in proof).

[139] Norris v. State, 490 So. 2d 839 (Miss. 1986). The *McDaniel* Rule states:

> If a defendant, when sober, is capable of distinguishing between right and wrong, and the defendant voluntarily derives himself of the ability to distinguish between right and wrong by reason of becoming intoxicated and commits an offense while in that condition, he is criminally responsible for such acts.

McDaniel v. State, 356 So. 2d 1151, 1161 (Miss. 1978). In *Norris*, the court held that where intoxication has been made an issue, a *McDaniel* instruction is proper even though the defendant did not expressly assert intoxication as a defense. *Norris*, 490 So. 2d at 842.

[140] Malone v. State, 486 So. 2d 360 (Miss. 1986). Defendant Malone was convicted as an accessory before the fact to armed robbery. *Id.* at 363. Defendant appealed his conviction on the grounds that the instructions to the jury submitted the case on a criminal conspiracy theory, without defining accessory before the fact. *Id.* at 363-64. The court ruled that such words as "conspiracy" and "to conspire" may be used in instructions to connote the type of participation necessary for a conviction as an accessory before the fact. *Id.* at 364. Even assuming *arguendo* that such instructions were deficient, the court

application of the *Weathersby* Rule,[141] appropriateness of instructions on lesser-included offenses,[142] proper preservation for appeal of objections to instructions,[143] denial of instructions which are "erroneous,

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ruled that any errors had been cured by other instructions. *Id.* at 364. The court restated the long established rule that instructions must be considered as a whole, rather than in isolation, to determine if the jury was properly instructed. *Id.* at 365. *See also* Gray v. State, 487 So. 2d 1304, 1306-08 (Miss. 1986)(although conspiracy instruction failed to require finding that defendant knowingly participated in criminal plan, reversal unnecessary since instructions considered as a whole included all required elements of crime).

[141] Braxton v. State, 485 So. 2d 300 (Miss. 1986). In *Braxton*, the defendant was convicted of the rape of an 82 year-old woman. On appeal, defendant Braxton contended that his version of the story should have been accepted under the *Weathersby* Rule, as established in Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933). The *Weathersby* Rule requires acceptance of the defendant's or his eye witnesses' account of the events if they are the only eye witnesses, "unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge." *Weathersby*, 165 Miss. at 209, 147 So. at 482. The court held that the *Weathersby* Rule had no application to the *Braxton* case since the defendant was not the only eye witness to the crime — the victim was also available to testify. Furthermore, physical evidence, including fingerprints, at the scene of the crime contradicted the defendant's story. *Braxton*, 485 So. 2d at 301. *See also* Griffin v. State, 495 So. 2d 1352, 1355 (Miss. 1986)(held *Weathersby* Rule is rule of law to be applied by court, rather than question of fact for jury); Weeks v. State, 493 So. 2d 1280, 1283 (Miss. 1986)(where testimony by doctor who performed autopsy of deceased conflicted with defendant's version that shooting was accidental, trial court's denial of *Weathersby* instruction proper); Mullins v. State, 493 So. 2d 971, 975 (Miss. 1986)(defendant who asserted self-defense not entitled to *Weathersby* instruction where evidence established victim had been shot in back); Harveston v. State, 493 So. 2d 365, 371 (Miss. 1986)(held under *Weathersby* Rule jury not required to accept defendant's assertion of self-defense where circumstances surrounding incident materially conflict).

[142] *See* Gates v. State, 484 So. 2d 1002, 1004 (Miss. 1986)(denial of lesser-included offense proper where "no reasonable jury could find the defendant guilty of the lesser included offense"); Messer v. State, 483 So. 2d 338, 340 (Miss. 1986)(where defendant's own testimony amounted to confession of selling marijuana, denial of instruction on lesser-included offense of possession proper).

[143] Watson v. State, 483 So. 2d 1326 (Miss. 1986). The defendant in *Watson* was indicted and convicted of attempted child abuse. *Id.* at 1328. Duiring trial, the court instructed the jury that they could *infer* the defendant's intent to commit the crime from acts which showed "an utter disregard for the consequences" and "indicating no concern for the well-being" of the child. *Id.* at 1329. On appeal, the Mississippi Supreme Court held the instruction to be improper on the basis that it was too broad, "covering a wide range of behavior," and constituted an unacceptable "statement of an abstract legal principle." *Id.* However, the court denied relief on the grounds that the objection to the instruction had not been properly preserved for appeal. *Id.* Pursuant to MISS. SUP. CT. R. 42, specific objection to the instruction, accompanied with a statement of the particular grounds for objection, must be made at trial in order to assign the granting of the instruction as error on appeal. *Id.* The court held that only a general objection to the instruction had been made. *Id.*

confusing, and misleading,"[144] and faulty granting of instruction that defendant became aggressor and lost right of self-defense.[145]

Factually, the most unusual case involved a kidnapping conviction in *Phillips v. State*.[146] Defendant admitted that he seized the Marshall County Jail in Holly Springs, Mississippi by gunpoint on the night of February 23, 1983, and held three persons captive for several hours.[147] However, defendant asserted the defense of entrapment,[148] alleging that he had been instructed by the sheriff, with the knowledge and consent of Deputy Goode, to overtake the jail as a stunt to bring publicity to the criminal cover-ups occurring in the county at that time.[149] The trial judge instructed the jury that defendant Phillips had failed as a matter of law to prove the defense of entrapment and that the jury should not consider the alleged defense.[150] The judge further instructed the jury that a guilty verdict was proper if the jury found the defendant had kidnapped *any one* of the three alleged victims.[151] On appeal, the Mississippi Supreme Court held that defendant Phillips

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[144] Holmes v. State, 483 So. 2d 684 (Miss. 1986). The court affirmed the denial of defendant's requested instruction which combined three different manslaughter statutes and then required the state to prove all three. *Id.* at 686. Additionally, the court upheld the trial court's refusal to grant an instruction requiring the jury to consider eye witness identification testimony with caution, citing Robinson v. State, 473 So. 2d 957 (Miss. 1985) which expressly stated that "such an instruction should *not* be given." *Holmes*, 483 So. 2d at 686-87.

[145] Williams v. State, 482 So. 2d 1136 (Miss. 1986). The trial court in *Williams* instructed the jury that the defendant could not claim self-defense if the jury found that the defendant had armed himself with a weapon with the intent to use such weapon if necessary, and that the defendant had entered into an encounter with the victim without ever withdrawing or abandoning his original purpose. *Id.* at 1138. The Mississippi Supreme Court reversed the conviction holding that such an instruction should be given in rare cases. *Id.* at 1139. The court ruled that the facts were disputed as to self-defense and only a properly instructed jury could resolve the issue. *Id.*

[146] 493 So. 2d 350 (Miss. 1986). Defendant Phillips was sentenced as a recidivist to 28 years in prison for the crime. *Id.* at 353.

[147] *Id.* at 352. The three persons allegedly kidnapped by Phillips included the radio dispatcher, and two sheriff's deputies, Goode and Adkins. *Id.* at 351.

[148] *Id.* at 352.

[149] *Id.* The evidence showed that a community in Marshall County, known as Lake Center, had been experiencing numerous house burglaries and arsons. The sheriff contacted defendant Phillips to engage his assistance in solving these crimes. *Id.* at 351. Phillips testified that on two occasions prior to the actual jail seizure the sheriff had "ordered" defendant Phillips to take over the jail, but he had refused. *Id.* Phillips further testified that a short time prior to the actual jail capture Phillips informed Deputy Goode of his plans. *Id.* at 351.

[150] *Id.* at 353.

[151] *Id.* at 356.

was entitled to an entrapment instruction, but only as to victim Deputy Goode.[152] Since the jury returned a general verdict, thereby making it impossible for the court to determine upon which grounds the defendant had been convicted, the court reversed the judgment and remanded the case for a new trial.[153]

In *Carter v. State*,[154] the Mississippi Supreme Court addressed an issue which the court considered to be a source of confusion for attorneys and judges alike. Carter was tried and convicted of murder,[155] based upon jury instructions that "malice may be inferred from the use of the weapon."[156] The court determined that such an instruction in this case was improper, but when considered in conjunction with other instructions, the error was not prejudicial.[157] The court set forth the following rule for determining whether such an instruction should be granted, noting that it is rare when such an instruction is proper:

> An instruction [inferring malice] . . . should be granted only where the evidence has failed to establish the circumstances surrounding use of the weapon. Where the facts have been set forth, even on conflicting testimony, the question of malice

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[152] *Id.* The court noted:

> The defense of entrapment is available only when the person offended is the one who conceived the criminal scheme and induced the accused to commit it. The defense of entrapment in the context of a crime against the person of another is not available when the person, said to have conceived the criminal act, and induced the accused to commit it, is not the person offended.

Id. at 354. Thus, since Phillips asserted that the jail seizure was the result of orders from the sheriff, the defense of entrapment to the kidnapping of the dispatcher and Adkins, who were innocent third parties, was not available. However, the jury should have been allowed to resolve the issue of entrapment as it applied to Deputy Goode, since evidence had been admitted to the effect that Goode had advance knowledge of the kidnapping scheme and had participated in the plan and consented to its execution. *Id.* at 355.

[153] *Id.* at 356. The court noted that, if the conviction were predicated upon a finding that Phillips had kidnapped Goode, then the guilty verdict rested upon an insufficient ground since the defense of entrapment should have been considered. *Id.* Under the rule set forth in Stromberg v. California, 283 U.S. 359 (1931), *rev'd*, 437 U.S. 1 (1977), and Zant v. Stephens, 462 U.S. 862 (1983), where one of the grounds for conviction is insufficient, a general verdict must be set aside if the court cannot determine upon which ground the jury rendered the guilty verdict. *Phillips*, 493 So. 2d at 355. Since the jury in *Phillips* could have determined guilt upon a finding that the dispatcher or Adkins, or Goode had been kidnapped, reversal was required. *Id.* at 356.

[154] 493 So. 2d 327 (Miss. 1986).

[155] *Id.* Carter shot one Zachary Goff in the left temple with a pistol defendant had obtained from his bedroom. Goff died from the wound. Carter alleged the shooting was the combined result of an accident and self-defense. *Id.* at 328-39.

[156] *Id.* at 330.

[157] *Id.*

should be left for the consideration of the jury.[158]

Sentencing

As usual, the Mississippi Supreme Court considered numerous cases alleging that the sentence imposed by the trial court constituted cruel and unusual punishment in violation of the federal[159] and state[160] constitutions. In deciding whether a sentence is unconstitutional, Mississippi follows[161] the guidelines formulated by the United States Supreme Court in *Solem v. Helm*[162] and *Rummel v. Estelle*.[163]

Many of the challenged sentences were imposed in accordance with the habitual offender statutes.[164] The court has held that the ha-

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[158] *Id.*

[159] The eighth amendment to the United States Constitution, as applied to the states through the fourteenth amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[160] Miss. Const. art. III, § 28 provides: "Cruel or unusual punishment shall not be inflicted, nor excessive fines be imposed."

[161] *See* Jenkins v. State, 483 So. 2d 1330, 1333 (Miss. 1986)(discussion of Solem v. Helms and Rummel v. Estelle: sentence of 20 years' imprisonment as recidivist without reduction, revocation or parole for arson held not cruel or unusual).

[162] 463 U.S. 277 (1983). In *Solem*, the United States Supreme Court set forth the test for determining if a sentence was proportionate to the crime:

> In sum, a court's proportionality analysis under the eighth amendment should be guided by objective criteria, including (i) the gravity of the offense and harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 292.

[163] 445 U.S. 263 (1980). In upholding a sentence of life imprisonment as a recidivist based upon conviction for a third felony, the United States Supreme Court said:

> Its [recidivist statute] primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

Id. at 284-85.

[164] Mississippi has two recidivist statutes which compel enhanced punishment for repeat offenders. Miss. Code Ann. § 99-19-81 (Supp. 1986) orders that the maximum

bitual offender laws as written do not violate the constitutional prohibitions against cruel and unusual punishment.[165] As applied, however, the state must prove beyond a reasonable doubt all of the elements specified in the applicable recidivist statute.[166] For example, where the state fails to prove that the offender actually served any time, the offender cannot be convicted as a recidivist under Mississippi Code section 99-19-83.[167] For a conviction under section 99-19-83, it is sufficient that the two prior sentences were served consecutively.[168]

The case of *Burt v. State*[169] caused disagreement among the Mississippi Supreme Court as to whether a sentence of fifteen years without probation or parole as a recidivist constituted cruel and unusual punishment for the crime of uttering a $35.00 forgery.[170] The state proved that the defendant had two prior convictions for burglary of a dwelling house, each of which resulted in sentences of more than one year, and therefore, pursuant to section 99-19-81 of the Mississippi Code, should receive the maximum sentence for uttering a forgery.[171] By statute, the sentence to be imposed for a forgery was not less than two years nor more than fifteen years, with the exception that the

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term of imprisonment be imposed for any person convicted of a felony who has also been convicted of two prior felonies arising out of separate incidents and who shall have been *sentenced* to separate terms of one year or more for the prior felonies. MISS. CODE ANN. § 99-19-83 (Supp. 1986) is identical to the aforementioned statute, except that the offender must have been sentenced *and served* one or more years for the prior felonies and life imprisonment must be imposed if one of the prior felonies was a crime of violence. Both statutes forbid reduction or suspension of the sentence and further provide that the offender shall not be eligible for probation or parole.

[165] *See* Bridges v. State, 482 So. 2d 1139, 1140 (Miss. 1986)(held MISS. CODE ANN. § 99-19-81 constitutional); Baker v. State, 394 So. 2d 1376, 1378-79 (Miss. 1981)(held MISS. CODE ANN. § 99-19-83 constitutional).

[166] Ellis v. State, 485 So. 2d 1062, 1063 (Miss. 1986).

[167] *Id.* at 1064 (sentence of life imprisonment as recidivist pursuant to MISS. CODE ANN. § 99-19-83 reversed where state failed to prove defendant served one year or more for prior felonies). *But see* Weaver v. State, 497 So. 2d 1089, 1096 (Miss. 1986)(conviction of defendant as recidivist pursuant to MISS. CODE ANN. § 99-19-81 unaffected by probation or suspension of prior sentences). For a discussion of the requirements of Mississippi's recidivist statutes, see *supra*, note 6.

[168] *See* Jackson v. State, 483 So. 2d 1353, 1356-57 (Miss. 1986)(held "statute does not require that the terms served must have an intervening period between them when the defendant is free of confinement"; life sentence as recidivist for burglary of dwelling affirmed).

[169] 493 So. 2d 1325 (Miss. 1986).

[170] *Id.* Six justices affirmed the sentence. *Id.* at 1330-31. Three justices, Prather, Dan Lee, and Sullivan, dissented from the majority opinion on the basis that in their view the sentence constituted cruel and unusual punishment. *Id.*

[171] *Id.* at 1329.

judge could in his discretion order a sentence of twelve months if the forgery involved an amount less than $100.00. The majority held that the recidivist statute unambiguously required that the maximum sentence, namely fifteen years, be imposed, and that the trial judge had no discretion to order otherwise.[172] The dissenting justices were of the view that the recidivist statute did not abrogate the trial judge's authority to exercise discretion and order a twelve month sentence if the forgery amounted to less than $100.00.[173] Thus, the dissenting justices would have declared the fifteen-year sentence for uttering a $35.00 forged check to be cruel and unusual punishment.[174]

In *Fanning v. State*,[175] the Mississippi Supreme Court affirmed the rule that where two or more criminal statutes cover the same criminal activity but one imposes a greater penalty than the other, the state is free to prosecute under either statute,[176] provided the accused has fair notice of the crime with which he is charged.[177] However, "where from a fair reading of the indictment in the light of the several statutes in our criminal code, the accused cannot identify with reasonable certainty the statute the prosecution has elected to proceed under, the accused upon conviction will be liable for punishment only under the lesser statute."[178]

The Mississippi Supreme Court upheld the authority of trial courts to pronounce a sentence during vacation,[179] and to condition probation or suspension of a sentence upon payment of a fine, costs, or

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[172] *Id.* The court noted that, without objection, the district attorney had stated at trial that the defendant had committed eight additional forgeries against the same victim. *Id.* at 1330. This foreclosed any idea that the $35.00 forgery may have been an isolated occurrence. *Id.*

[173] *Id.* at 1331 (Prather, J., dissenting). The dissent opined "[i]n other words, there are two maximum terms provided by this statute, and discretion is not removed by the enhanced punishment factor." *Id.*

[174] *Id.* Additionally, the dissenting justices were of the opinion that the defendant had not been afforded an adequate sentencing hearing. *Id.* at 1332.

[175] 497 So. 2d 70 (Miss. 1986).

[176] *Id.* at 73 (citing Cumbest v. State, 456 So. 2d 209, 222 (Miss. 1984)).

[177] *Weaver*, 497 So. 2d at 1092.

[178] *Id.* In *Weaver*, the court affirmed a 10 year sentence under Mississippi's second degree arson statute, notwithstanding the accused's allegations that his sentence should have been limited to five years pursuant to the insured property arson statute. *Id.* at 1092-93.

[179] Miller v. State, 492 So. 2d 978, 982 (Miss. 1986). In *Miller*, the court further ruled that the power of the court to render a sentence during vacation cannot be limited by inadvertent remarks by the judge to the effect that the hearing "will have to be done this court term." *Id.* at 983. *See also* Miss. Unif. Crim. R. Cir. Ct. Prac. 6.01 ("The sentence shall be pronounced in open court, in term time or vacation . . .").

restitution to the victim.[180] Additionally, trial courts have the power to correct an obviously irregular jury verdict so as to make it conform to the jury's clear and unequivocal intent.[181] Even where a clerical error is made, courts have no authority to revoke an unequivocal suspension after the suspension period has expired.[182] If, on the other hand, petition for revocation of probation is filed *prior to* the expiration of the probationary period, the probationary period is tolled and a revocation ordered after what would have been the expiration of the period is valid.[183]

During 1986, the Mississippi Supreme Court maintained certain limitations on sentencing. *Odom v. State*[184] reannounced the *Dycus*[185] rule which provides that double jeopardy precludes the imposition of the death penalty in a second trial upon a defendant who had previously been sentenced only to life imprisonment in a prior trial for the same crime.[186] Additionally, the court reaffirmed the rule which prohibits the imposition of a heavier sentence based upon the defendant's decision to pursue his constitutional right to trial by jury instead of

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[180] *See Fanning*, 497 So. 2d at 74 (affirmed probation conditioned upon payment of costs of special election by defendant found guilty of feloniously reporting false account of votes in Democratic Primary Election).

[181] Singleton v. State, 495 So. 2d 14, 16 (Miss. 1986). In *Singleton*, the defendant was indicted for attempted armed robbery, and the jury was instructed as to the crime of attempted armed robbery. *Id.* Nevertheless, the jury returned a guilty verdict of armed robbery. *Id.* at 15. The court reasoned that to find the defendant guilty of armed robbery, the jury had to adjudge the accused guilty of attempted armed robbery. *Id.* at 16. Therefore, the court ruled "the omission of 'attempted' from the verdict was an oversight rather than a finding that Singleton was guilty of some other crime than that with which he was charged," and allowed correction of the verdict. *Id.*

[182] Sisson v. State, 483 So. 2d 1338, 1339 (Miss. 1986). In *Sisson*, defendant's sentencing order for burglary provided for a three year suspension, despite the judge's usual practice of ordering a five year suspension. After the expiration of the three year suspension, the defendant allegedly committed an aggravated assault upon a police officer. The state sought to have the suspension revoked and service of the original sentence ordered. The trial judge attempted to correct the prior clerical error so as to recite a five year suspension, and ordered service of the suspended sentence. The Mississippi Supreme Court reversed, ruling that an unequivocal suspension cannot be challenged after the stated period of suspension has expired. *Id.* at 1339. A defendant's risk of serving a sentence terminates upon the expiration of the suspension period. *Id.*

[183] *See, e.g., Jackson*, 483 So. 2d at 1356 (revocation of probation valid where petition filed 11 days prior to expiration of probation period and court acted on petition within reasonable time of 13 days).

[184] 498 So. 2d 331 (Miss. 1986).

[185] Dycus v. State, 440 So. 2d 246 (Miss. 1983).

[186] *Odom*, 498 So. 2d at 332-33.

agreeing to plea bargain.[187] Furthermore, the court announced that where there is a disparity in the sentencing of co-defendants, one of whom proceeds to trial while the other pleads, the trial judge must explain the reasons for such disparity.[188] In a sentencing hearing, evidence of the sentences imposed on co-indictees is irrelevant and inadmissible.[189]

Other Criminal Cases

The Mississippi Supreme Court also considered numerous cases addressing varied issues.[190] Without opinion, the court affirmed the convictions and sentences of seven cases[191] under the authority of *Mo-*

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[187] *But see* Temple v. State, 498 So. 2d 379, 380-81 (Miss. 1986)(where trial judge did not participate in plea negotiations, sentence of 10 years and fine of $10,000 affirmed, even though actual sentence exceeded proposed three-year sentence for plea of guilty); Graves v. State, 492 So. 2d 562, 566 (Miss. 1986)(where defendant rejects plea bargain agreement, state may reindict defendant; trial court may impose heavier sentence, based on evidence presented at trial, than had been agreed to in plea negotiations).

[188] *See* McGilvery v. State, 497 So. 2d 67, 69 (Miss. 1986)(where triggerman in armed robbery pled guilty and only received 25 year sentence, trial judge must explain reasons for imposing 45 year sentence on co-defendant who refused to plea bargain and insisted on trial).

[189] *See* Stringer v. State, 501 So. 2d 928, 941-42 (Miss. 1986)(evidence that co-indictee received death penalty held irrelevant to proper sentence to be imposed on defendant being tried).

[190] *See, e.g.*, Hentz v. State, 496 So. 2d 668, 672 (Miss. 1986)(held fifth amendment privilege against self-incrimination not applicable where witness not in danger of prosecution or conviction); Lightsey v. State, 493 So. 2d 375, 377-78 (Miss. 1986)(defendant not placed in double jeopardy where same burglary charge used to try defendant for crime and to revoke parole for embezzlement); Porter v. State, 492 So. 2d 970, 972-73 (Miss. 1986)(defendant's constitutional rights not violated by court-ordered psychiatric examination since incriminating statements made during such examination inadmissible in criminal proceeding under Miss. Unif. Crim. R. Cir. Ct. Prac. 4.08(2)); Butler v. State, 489 So. 2d 1093, 1094 (Miss. 1986)(where youth not certified to be tried as an adult, circuit court without jurisdiction; dismissal of such case after jury impaneled and sworn and subsequent prosecution for same crime in court of competent jurisdiction not violation of double jeopardy prohibition); Henry v. State, 486 So. 2d 1209, 1211 (Miss. 1986)(even though youth court retains jurisdiction of youth until age 20, circuit court nevertheless has jurisdiction to try new offenses committed by juvenile after attaining 18 years of age); Ruffin v. State, 482 So. 2d 231, 232 (Miss. 1986)(held evidence clearly supported conviction for embezzlement of rented car even though defendant used false name to obtain possession of car).

[191] *See* Rodriquez v. State, 498 So. 2d 1230 (Miss. 1986)(20 year sentence for armed robbery conviction affirmed); Jimmerson v. State, 498 So. 2d 844 (Miss. 1986)(conviction of aggravated assault and sentence of 12 years' imprisonment affirmed); Landingham v. State, 498 So. 2d 382, 383 (Miss. 1986)(16 year sentence with eight years suspended for manslaughter affirmed); Ragland v. State, 498 So. 2d 373 (Miss. 1986)(conviction of

rea v. State.[192]

In considering the jury selection process, the court held that it was prejudicial error for the prosecutor to inform the jurors during voir dire that the thirteen-year-old rape victim had undergone an abortion.[193] In *Weaver v. State*,[194] the court held that to allow a deaf person to sit on a jury would "constitute a denial of the accused's rights to due process of law and to trial before a fair and impartial jury."[195] The court addressed the right to excuse jurors for opinions on the death penalty in *Stringer v. State*.[196] The court reiterated the test for excusing a juror: "that the juror would be unable to follow the court's instructions and obey the juror's oath."[197] The court noted that absent clear evidence that the juror would not follow the court's instructions, it would be reversible error to excuse a juror based on that juror's opinions about the death penalty. However, if there is doubt as to the juror's position, then the decision whether or not to excuse the juror is in the discretion of the judge.[198]

In three cases,[199] the court considered problems with jury sequestration. The court stressed that jury sequestration is automatic and

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armed robbery and 15 year sentence with 10 years suspended or five years supervised probation and five years served and pay all costs affirmed); Hawkins v. State, 488 So. 2d 800, 801 (Miss. 1986)(life imprisonment for murder affirmed); Burkett v. State, 484 So. 2d 1046 (Miss. 1986)(20 year sentence for manslaughter conviction affirmed); Smith v. State, 484 So. 2d 364 (Miss. 1986)(20 year sentence without probation or parole as recidivist for aggravated assault affirmed).

[192] 329 So. 2d 527 (Miss. 1976). The Mississippi Supreme Court ruled in *Morea* that the court need not issue "needless opinions or opinions restating well established rules of law." *Id.* at 527.

[193] Stokes v. State, 484 So. 2d 1022, 1025 (Miss. 1986). The court reasoned that "the jury could very well have concluded that not only did Stokes rape the child, he made her pregnant as well . . . ." *Id.* The court determined that such a prejudicial error could not be corrected by instructions, and that the trial judge erred in denying a motion for mistrial. *Id.*

[194] 497 So. 2d 1089 (Miss. 1986).

[195] *Id.*

[196] 500 So. 2d 928 (Miss. 1986).

[197] *Id.* at 943.

[198] *Id.*

[199] Carter v. State, 493 So. 2d 327, 329 (Miss. 1986)(inadvertent entry of witnesses into sequestered jury room to acquire coffee did not mandate reversal where evidence showed no improper influence on jurors); Griffin v. State, 492 So. 2d 587, 588-89 (Miss. 1986)(conviction by unsequestered jury affirmed where no request for sequestration was made and state sought no death penalty); Gill v. State, 488 So. 2d 801, 802-03 (Miss. 1986)(where sequestration of jury not requested by parties, failure to sequester jury during lunch in non-capital murder trial did not constitute prejudicial error even though judge may have intended for jury to be sequestered).

mandatory only in cases where the state seeks the death penalty; in all other cases, a request for sequestration must be made at least forty-eight hours in advance of trial by the party seeking sequestration, and that it is in the judge's discretion to grant or deny the request.[200]

Finally, the court addressed the defense of insanity. The court stressed that, under the *M'Naughten* test, before an accused can be found not guilty by reason of insanity there must be evidence that the accused was "unable to distinguish between right and wrong."[201] Even where expert opinions have been introduced, the issue of insanity is a question to be resolved by the jury only.[202] In considering insanity, the Mississippi Supreme Court justices were far less than unanimous in their views of the issue. In *Laney v. State*,[203] Justice Robertson called for the abolishment of insanity as a defense, and consideration of any mental illness only in the sentencing phase.[204] In *Gill v. State*,[205] Justice Hawkins championed the abolishment of the *M'Naughten* rule in cases involving a paranoid schizophrenic,[206] and asserted that the proper test should be "whether the paranoid schizophrenic was so deranged that he was incapable of knowing the person he assaulted or killed was an individual who posed no threat whatever to his or anyone else's well-being or safety."[207]

Arrest/Search & Seizure

The most important determination regarding the validity of an arrest, search, or seizure is whether the procedure used by law enforcement officers was proper under the circumstances.[208] In the decisions rendered this term on these issues of criminal procedure,[209] the court

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[200] *Griffin*, 492 So. 2d at 588.

[201] Merrill v. State, 482 So. 2d 1147, 1150 (Miss. 1986)(refusal to give instruction on insanity proper where accused admitted that at time she committed killing she knew it was wrong).

[202] Gill v. State, 488 So. 2d 801, 802 (Miss. 1986); Laney v. State, 486 So. 2d 1242, 1245 (Miss. 1986).

[203] 486 So. 2d at 1247 (Robertson, J., concurring).

[204] *Id.*

[205] 488 So. 2d at 803 (Hawkins, J., dissenting).

[206] *Id.* at 809.

[207] *Id.* at 807.

[208] Smith v. State, 386 So. 2d 1117, 1119 (Miss. 1980). *See generally* Swainer v. State, 473 So. 2d 180, 186 (Miss. 1986)(discussion of significance of applying proper procedure to given set of circumstances).

[209] Floyd v. State, 500 So. 2d 989 (Miss. 1986); Cole v. State, 493 So. 2d 1333 (Miss. 1986); Moore v. State, 493 So. 2d 1295 (Miss. 1986); Kelly v. State, 493 So. 2d 356 (Miss. 1986); Drane v. State, 493 So. 2d 294 (Miss. 1986); Lee v. State, 489 So. 2d 1382 (Miss.

emphasized that factual as well as practical considerations must be weighed in order to decipher the correct procedure to be used in enforcement of the law.

In the execution of a lawful arrest for a felony, with or without obtaining a warrant, the court has maintained that the police officer must not only have reasonable cause to believe a felony has been committed, but must also have reasonable cause to believe that the prospective arrestee is the felon.[210] Additionally, the court has stated that bare suspicion will not rise to the level of probable cause in effectuating a lawful arrest.[211] As to whether or not the essential element of probable cause existed, the Mississippi Supreme Court has firmly adhered to the "totality of the circumstances test" propounded by the United States Supreme Court in *Illinois v. Gates*.[212]

The opinion of *Garvis v. State*[213] merits attention for pointing out the type of affidavit for a search warrant that the court will regard favorably when probable cause is attacked.[214] The court stressed the

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1986); Henry v. State, 486 So. 2d 1209 (Miss. 1986); Harper v. State, 485 So. 2d 1064 (Miss. 1986); Garvis v. State, 483 So. 2d 312 (Miss. 1986).

[210] *Henry*, 486 So. 2d at 1212. Henry confessed to a burglary after being arrested on that charge. Henry appealed his conviction contending that since the arrest was illegal, his confession was inadmissible. Although the case focused on the admissibility of the confession, the opinion provides helpful discussion of the procedure for an arrest. *Id.* at 1211-14. *See Moore*, 493 So. 2d at 1298 (probable cause as prerequisite to lawful arrest); *see also Kelly*, 493 So. 2d at 359 (officers who heard over police radio broadcast of warrant for arrest had probable cause to arrest individual named).

[211] *Floyd*, 500 So. 2d at 991. Floyd was arrested by state troopers who suspected that he and a companion, driving separate cars were transporting marijuana across state lines. *Id.* at 990. After a series of events leading to the arrest of his cohort on a charge of possession, Floyd was stopped, searched and arrested for possession as well. *Id.* at 991. Floyd appealed his conviction contending the evidence should have been suppressed since the arrest was illegal in that the officer acted on suspicion only. *Id.* The Mississippi Supreme Court in reviewing the totality of the circumstances held that his arrest was illegal since it was based upon less than a probable cause belief. *Id.* at 992. The court held the officers had little more than speculation that Floyd was involved in illicit activity with the driver of the other vehicle. *Id.* at 993.

[212] 462 U.S. 213 (1983). *See* Lee v. State, 453 So. 2d 674, 675 (Miss. 1983)(court accepted the "totality of the circumstances" approach for determining whether probable cause exists).

[213] 483 So. 2d 312 (Miss. 1986).

[214] *Garvis*, 483 So. 2d at 314-15 n.1. After verifying information supplied by a reliable informant, police stopped Garvis' vehicle and arrested him and his companion who were believed to be selling illegal narcotics. *Id.* at 313. A frisk of the passenger yielded cocaine and a later search of the auto revealed more contraband. *Id.* at 314. Garvis appealed his conviction for possession of cocaine, alleging the lack of probable cause for the issuance of a search warrant. *Id.* Applying the totality of the circumstances test, the court held that the specificity of the affidavit for search warrant ensured that probable

importance of providing the underlying facts and corroborating circumstances necessary in the affidavit for a search warrant to remove any uncertainty as to whether there was probable cause to implement the warrant.[215] In the case of *Cole v. State*[216] the court considered the question of whether evidence derived from a blood alcohol content test was the product of an illegal search and seizure.[217] The court applied the standard principle that the search must have been predicated on probable cause.[218] The court cited an early opinion[219] for the premise that in order for the fruits of the search to withstand the exclusionary rule, probable cause must be found when a search is conducted without a warrant and is not incident to a lawful arrest.[220] Review of the attendant facts led the court to conclude that probable cause did not exist in this instance.[221] In addition, the court also held this term that pre-arrest consensual-participant monitoring of a conversation between an informant "wired for sound" and a defendant did not violate the defendant's privacy rights under either the Mississippi Constitution or the Federal Constitution.[222] The *Lee* opinion is an excellent source of

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cause had been met. *Id.* at 316.

[215] *Id.* at 314-15 n.1. The affidavit, sworn to by a reliable, confidential informant, gave detailed information, which had been corroborated by police investigation. *Id. See also Harper*, 485 So. 2d at 1065 (employing totality of circumstances test, the court held magistrate had basis in concluding there was probability that marijuana would be found in car).

[216] 493 So. 2d 1333 (Miss. 1986).

[217] *Id.* at 1334. Cole was driving his auto on an icy road when he lost control and struck a slow moving vehicle in another lane. As a result of the collision the driver of the other car was killed and her son was injured. Since Cole also sustained injures he was taken to a hospital where tests were taken for diagnostic purposes; among them was a blood alcohol content test. The positive results of the test were given to a deputy. Cole, who was indicted for manslaughter and aggravated assault, sought to have the test results suppressed on grounds that the test was an illegal search and seizure. Nevertheless Cole was convicted and on appeal he raised the argument that there was insufficient probable cause. *Id.* at 1335.

[218] *Id.*

[219] Hailes v. State, 268 So. 2d 345 (Miss. 1972).

[220] *Cole*, 493 So. 2d at 1335.

[221] *Id.* The facts revealed that the investigating officer had no information of his own or provided by others which would have indicated that alcohol was the cause of the fatal accident. Therefore, the court held that the request for Cole's blood alcohol test results was improper. *Id.*

[222] *Lee*, 489 So. 2d at 1382. An informer, "wired for sound" and monitored by several police officers, made arrangements to buy illegal narcotics from Lee at his home. Lee was subsequently arrested and at his trial the police officers monitoring the sound, as well as the informer, were allowed to testify concerning the drug transaction. Lee appealed his conviction contending the testimony of third parties not present during the

review of the evolving law concerning privacy right infractions with respect to searches and seizures which expose illegal transactions engaged in by defendants.[223] Although the opinion acknowledged the general proposition of the sanctity of the home,[224] the court ultimately asserted that the conversations which transpired at the defendant's home did not enjoy any right to privacy since the home had been converted into a "commercial center", by welcoming members of the public who wished to engage in illicit business transactions.[225] Moreover, concerning prior Mississippi caselaw, the court said, that there existed no distinction between using an electronically equipped agent and using an unequipped agent, for the purpose of gleaning evidence from a defendant engaged in unlawful activity.[226]

In another interesting case,[227] the court was confronted with the issue of whether Mississippi Game Officers had infringed on privacy rights when an individual was subjected to a vehicular stop, search, and seizure as officers performed a routine check at a designated roadblock.[228] The court stated that such a practice was "free of infirmity" under the Federal Constitution's fourth amendment right to privacy since the practice was necessary to enforce a valid state interest.[229] The court followed the balancing process instituted in the United States Supreme Court decision of *Delaware v. Prouse*[230] and applied recent

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conversation which was electronically transmitted without his consent and without a search warrant should not have been admitted into evidence. *Id.*

[223] *See* United States v. White, 401 U.S. 745, 754 (1971)(held eavesdropping by electronic means does not constitute search and seizure within meaning of fourth amendment); Everett v. State, 248 So. 2d 439, 443 (Miss. 1971)(electronic "bugging" does not tread on privacy right when consent of one of parties (informer) is first obtained).

[224] *Lee*, 489 So. 2d at 1386.

[225] *Id*; *see* Lewis v. United States, 385 U.S. 206, 211 (1966)(home used to conduct illegal business transactions transforms into "commercial center" and is equivalent to public place).

[226] *Lee*, 489 So. 2d at 1385. *See* Ladner v. State, 276 So. 2d 686, 687-88 (Miss. 1973)(no difference between "equipped" and "nonequipped" agent substantial enough to require discrete constitutional recognition).

[227] *Drane*, 493 So. 2d at 294.

[228] *Id.* at 295. In *Drane*, wildlife officers had stopped Drane's truck in order to perform a routine game check and, detecting the odor of marijuana, proceeded to search the vehicle, whereupon a plastic bag filled with a narcotic was found. The wardens then obtained a warrant to search the family's house, believing that Drane might have deposited additional drugs there. Drane was convicted of possession with intent to deliver. He appealed contending that the game wardens' conduct was an invasion of his privacy rights and as such, the "fruits" of that infraction were inadmissible. *Id.*

[229] *Id.* at 296-97.

[230] 440 U.S. 648 (1979). The United States Supreme Court propounded a test that balanced the legitimate state interest against the psychological intrusion occasioned by

case law from other jurisdictions to reach this conclusion.[231] Since procedure may be in accord with federal standards yet violate state constitutional or statutory requirements,[232] the court seized upon the opportunity to pursue the question of whether the stop and subsequent search was legal under Mississippi standards of lawful conduct.[233] In reviewing the statutes applicable to stops, searches, and seizures, the court uncovered a conflict between two statutes.[234] The court has in the past sought to harmonize statutes if possible in order to effectuate the underlying policy.[235] The court in its final analysis reasoned that in order to properly enforce wildlife management, game officers must be allowed to make routine stops of vehicles in designated areas under their supervision.[236] Additionally, the court held that probable cause was necessary to engage in any search under the circumstances of this case.[237] Therefore, the court viewed the initial stop and ensuing search as permissible.[238] With respect to search and seizure and potential infractions of the right to privacy, the court appears to be applying an unarticulated, flexible concept of reasonableness.

Venue

The Mississippi Supreme Court, in several cases, addressed the issue of change of venue. Three decisions merit discussion. In *Cabello v. State*[239] the court embarked on a course to clarify and capsulize the Mississippi law on the subject of change of venue. Cabello, who was

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the stop. *Id.* at 661.

[231] *See* State v. Tourtillott, 289 Or. 845, 618 P.2d 423, 427 (1980), *cert. denied*, 452 U.S. 972 (1981)(recognizing legitimate state interest in conservation of game, stop at designated checkpoint was routine, not discretionary).

[232] *Drane*, 493 So. 2d at 297. *See* Pinkton v. State, 481 So. 2d 306, 309 (Miss. 1985)(procedure may not meet state law standards yet be in agreement with federal mandates).

[233] *Drane*, 493 So. 2d at 297-98.

[234] *Id*; *cf.* Miss. Code Ann. § 49-1-43 (Supp. 1985)(permits searches for violation of laws relating to wild animals, birds, and fish) *with* Miss. Code Ann. § 49-1-29 (Supp. 1985)(permits searches of vehicles by officer without cause).

[235] *Drane*, 493 So. 2d at 298.

[236] *Id.*

[237] *Id.*

[238] *Id.* The search of the truck was permissible since the warden had probable cause when he detected the odor of marijuana. *Id.* Since the truck search was proper, the evidence obtained from the search of the house was admissible, and not "fruit of the poisonous tree". *Id. See generally* Wong Sun v. United States, 397 U.S. 471, 488 (if illegal search leads to second search, evidence obtained in second search is tainted by illegality of first search).

[239] 490 So. 2d 852 (Miss. 1986).

convicted of capital murder,[240] argued that the court erred in overruling his motion for a change of venue since he believed that an impartial jury could not be found in Alcorn County.[241] The court articulated the rule that a criminal defendant has a right to a change of venue when the prospects for obtaining an impartial jury appear doubtful.[242] The court concluded that this potential result could only be ascertained by scrutinizing the totality of the circumstances.[243] However, the majority reiterated that deference must be ascribed to the trial judge who, by utilizing sound discretion, must ultimately determine the granting of venue.[244] In the final analysis, the court affirmed the trial court's denial of the motion, since there was no indication from the record that an impartial jury could not be obtained.[245]

A second case which imposed significant procedural implications upon the venue question was *State v. Caldwell*.[246] In this capital murder case, the court considered the procedural posture of the defendant's petition which requested that venue for retrial of the sentencing phase be changed back to the county where the offense was committed.[247] The DeSoto Circuit Court concluded that the defendant had waived his right to be tried in the county where the crime was committed when the original venue was changed to DeSoto County.[248] The circuit court reasoned further that the sentencing phase should be con-

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[240] *Id.* at 858. Frank Cabello, Jr., participated in the robbery and murder of Vernon Gurley, an owner of a used car lot in Alcorn County. *Id.* at 854.

[241] *Id.* at 854-55. The defendant believed that the jury had probably read or heard about the criminal matter of his trial and thus, their objectiveness had been tainted. *Id.*

[242] *Id.* at 854.

[243] *Id.* at 855. *See* Fisher v. State, 481 So. 2d 203, 220 (Miss. 1985)(totality of circumstances review discussed); *see also* Johnson v. State, 476 So. 2d 1195, 1210 (Miss. 1985)(when it is doubtful fair jury could be obtained, accused is exercising his rights when requesting venue change).

[244] *Cabello*, 490 So. 2d at 854. The court cited *Fisher* for the proposition that the venue question is determined by the "sound" discretion, "not unfettered" discretion of the trial judge. *Id*; *see* Winters v. State, 473 So. 2d 452, 457 (Miss. 1985)(same).

[245] *Cabello*, 490 So. 2d at 855. The court reviewed the record finding no abuse of judiciary discretion since the trial judge received no indicia of proof that the jurors could not try this case fairly and impartially. *Id.*

[246] 492 So. 2d 575 (Miss. 1986), *cert. granted, vacated*, 105 S. Ct. 2633 (1987). Caldwell was remanded to the Supreme Court of Mississippi for further consideration in light of Griffith v. Kentucky, 107 S. Ct. 708 (1987), and Allen v. Hardy, 106 S. Ct. 2878 (1986).

[247] *Caldwell*, 492 So. 2d at 576. Bobby Caldwell was indicted for capital murder in Panola County and a request for change of venue to DeSoto County was granted. *Id.* Caldwell was convicted and sentenced to death. *Id.* However, because of prosecutorial misconduct during the sentencing phase, his case was remanded for resentencing. *Id.*

[248] *Id.*

ducted in the same county in which the guilt/innocence phase of the trial was held.[249] On appeal, the supreme court first noted that both the Mississippi Constitution and the federal constitution give the criminal defendant the prerogative to be tried in the district where the criminal act occurred.[250] Since there was no Mississippi case law on point, the court analogized to other constitutional rights.[251] In an earlier decision,[252] the court had ruled that an initial waiver of a jury trial was not binding when the defendant was retried pursuant to an appellate court reversal.[253] The court also discussed other constitutional rights such as the right to counsel and the privilege against self-incrimination.[254] With respect to these latter rights the court stated that if such rights were waived at an initial trial which culminated in reversal, upon appellate review, then upon retrial, these rights could again be invoked.[255] The court then concluded that the right to have a trial in the county where the crime occurred is in parity with the right's previously mentioned.[256] Hence, based on this analogy and on the fact that publicity surrounding Caldwell's original trial had waned, the court allowed Caldwell to reassert his constitutional right.[257] The court, however, issued a caveat that this particular decision would have no application where a sentencing phase was conducted immediately after a conviction and before appellate review.[258]

In a related case, *White v. State*,[259] the court addressed the presumption that an impartial jury cannot be obtained and addressed, the state's ability to rebut such presumption.[260] In *White*, the defendant, who had been convicted of forcible rape, contended on appeal that in view of the prejudicial pretrial publicity he had received in the newspaper, he was not provided with a fair trial by an impartial jury.[261] The

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[249] *Id.*

[250] *See* MISS. CONST. art. III § 26; U.S. CONST. amend. VI, XIV (criminal defendant has right to be tried in district where crime committed).

[251] *Caldwell*, 492 So. 2d at 577.

[252] Newton v. State, 211 Miss. 644, 52 So. 2d 488 (Miss. 1951).

[253] *Id.* at 649, 52 So. 2d at 489.

[254] *Caldwell*, 492 So. 2d at 577.

[255] *Id.*

[256] *Id.*

[257] *Id.* The court considered the six-year time lapse between the date of the killing and Caldwell's upcoming retrial. *Id.*

[258] *Id.*

[259] 495 So. 2d 1346 (Miss. 1986).

[260] *Id.* at 1349.

[261] *Id.* at 1347-48. A number of articles in the *Hattiesburg American* newspaper created strong inferences that White was connected with a series of unsolved rapes in the

court adhered to the dictates of recent decisions,[262] and summarily reaffirmed the general rules regarding change of venue. The court also recited the statutory procedures which must be followed before a motion for change of venue will be considered.[263] The thrust of the court's opinion addressed the burden placed upon the state to rebut the presumption that obtaining an impartial jury appears dubious.[264] Based upon the criteria established in the aforementioned case relating to change of venue, the court found that there was not enough evidence to create the inference that an irrebuttable presumption existed.[265] The court in the 1986 term also dealt succinctly with a proof of venue issue

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western part of Hattiesburg. *Id.*

[262] *Id.* at 1348-49. *See also* Wiley v. State, 484 So. 2d 339, 341 (Miss. 1986), *cert. denied*, 107 S. Ct. 304 (1986)(trial judge did not abuse discretion by considering totality of circumstances in refusing to change venue). In *Wiley*, the defendant was convicted of assaulting one individual and murdering another individual while in the commission of robbing a convenience store. *Wiley*, 484 So. 2d at 342. Wiley contended that he would be unable to obtain a fair trial by jury in DeSoto County since the case was highly publicized and the subject of local gossip. *Id.* at 342-43. The trial court nevertheless denied the motion for venue change. *Id.* at 343. On appeal the Mississippi Supreme Court held that the trial judge did not abuse his sound discretion in refusing to grant the motion. *Id.* In view of the totality of the circumstances, the trial judge acted properly in assuming a fair jury could be drawn through voir dire. *Id.*

[263] *White*, 495 So. 2d at 1348-49. Citing MISS. CODE ANN. § 99-15-35 (1972), the court stated:

> The "proper application" requirement consists of having the venue motion supported by affidavits of two or more witnesses, alleging that "by reason of prejudgment of the case or a grudge of ill will to the defendant in the public mind he cannot have a fair and impartial trial in the county where the offense is charged to have been committed."

White, 495 So. 2d at 1348-49.

[264] *White*, 495 So. 2d at 1349. The court recounted the factors set forth for consideration by the trial court so as to determine when the presumption is irrebuttable:

1) capital cases based on considerations of heightened standard of review;
2) crowds threatening violence toward the accused;
3) an inordinate amount of media coverage particularly in cases of
   a) serious crimes against influential families;
   b) serious crimes against public officials;
   c) serious crimes;
   d) crimes committed by a black defendant upon a white victim;
   e) where there is an inexperienced trial counsel.

Id.

[265] *Id.* The court noted the presence of four elements which may have indicated an inability to receive a fair jury trial: (1) there was a black defendant and a white victim, (2) there was a series of crimes committed, (3) there was supposition that the appellant was guilty of other crimes, and (4) there was extensive local media coverage. *Id.* The court nevertheless stated that the evidence was insufficient to warrant creating an irrebuttable presumption. *Id.*

in *Dunbar v. State*.[266]

Miscellaneous Procedural Issues

The Mississippi Supreme Court addressed a variety of other procedural issues: criminal contempt of a police officer,[267] parole revocation,[268] motion to vacate judgment,[269] duty of trial court to apprise the defendant that his conviction may be used to enhance his punishment for future crimes,[270] motion for severance,[271] notice of license suspension resulting from a D.U.I.,[272] nondisclosure of a plea agreement with a co-defendant as a potential basis for post-conviction relief,[273] death of appellant with regard to bringing his appeal,[274] misuse of motion under Rule 27 of the Mississippi Rules of Civil Procedure regarding perpetuation of testimony,[275] prospective juror's impaired performance of his duties, as indicated in voir dire,[276] implications of utilizing a line-up,[277] defendant's entitlement to preliminary examination into the competency of a witness,[278] entrapment with respect to a reverse undercover operation,[279] circuit court's jurisdiction over a minor not yet transferred from youth court,[280] circuit court's authority to review justice court's criminal convictions via writ of certiorari,[281] circuit court's jurisdiction to try offenses after offender's eighteenth birthday, even though the youth court retains authority over his juvenile offenses,[282] deadlocked jury,[283] discretionary role of judge in deciding motions for recess and daily continuance of proceedings,[284] mistrial elevated to

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[266] Dunbar v. State, 498 So. 2d 383 (Miss. 1986).
[267] Coleman v. State, 482 So. 2d 221, 223 (Miss. 1986).
[268] Bobkoskie v. State, 495 So. 2d 497, 500 (Miss. 1986).
[269] Rideout v. State, 496 So. 2d 497, 498 (Miss. 1986).
[270] Presley v. State, 498 So. 2d 841, 841 (Miss. 1986).
[271] Rigby v. State, 485 So. 2d 1060, 1061 (Miss. 1986).
[272] State v. Martin, 495 So. 2d 501, 502-03 (Miss. 1986).
[273] Malone v. State, 486 So. 2d 367, 368-69 (Miss. 1986).
[274] Berryhill v. State, 492 So. 2d 288, 289 (Miss. 1986).
[275] Evans v. State, 485 So. 2d 276, 284 (Miss. 1986).
[276] Wiley v. State, 484 So. 2d 339, 343-44 (Miss. 1986).
[277] Foster v. State, 493 So. 2d 1304, 1305-06 (Miss. 1986).
[278] McKinney v. State, 482 So. 2d 1129, 1130 (Miss. 1986).
[279] Barnes v. State, 493 So. 2d 313, 315-16 (Miss. 1986).
[280] Butler v. State, 489 So. 2d 1093, 1094 (Miss. 1986).
[281] Merrit v. State, 495 So. 2d 510, 510 (Miss. 1986).
[282] Henry v. State, 486 So. 2d 1209, 1211 (Miss. 1986).
[283] Gearlson v. State, 482 So. 2d 1141, 1143 (Miss. 1986).
[284] Fairley v. State, 483 So. 2d 345, 347-48 (Miss. 1986).

double jeopardy claim,[285] guilty verdict against weight of the evidence,[286] non-random assignment of jurors,[287] Mississippi Supreme Court's jurisdiction over criminal cases originating in municipal court,[288] out-of-time appeal,[289] certificate of appeal without filing of transcript,[290] and false pretenses with respect to a JNOV motion.[291]

INDICTMENT

The proper form of an indictment has been measured by the statutory parameters set forth in Rule 2.05 of the Mississippi Uniform Rules of Circuit Court Practice.[292] The court has followed the tenor of this statutory enactment holding that indictments may not be found to be defective so long as the main requisites of full notification of the nature and cause of the accusations are provided to the defendant.[293] In the decisions addressing the issues regarding amending the indictment, the court has taken a liberal posture in permitting such measures, provided the amendment is of "form" and not substance.[294] Additionally, the court has noted that the decisive consideration concerns whether or not the overall indictment sufficiently apprises the defend-

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[285] Watts v. State, 492 So. 2d 1281, 1284-85 (Miss. 1986).

[288] Griffin v. State, 494 So. 2d 376, 378-79 (Miss. 1986).

[287] Abram v. State, 498 So. 2d 843, 844 (Miss. 1986).

[288] Barrett v. State, 491 So. 2d 833, 833 (Miss. 1986).

[289] Barnett v. State, 497 So. 2d 443, 444 (Miss. 1986).

[290] Nealy v. State, 493 So. 2d 1294, 1295 (Miss. 1986).

[291] Parker v. State, 484 So. 2d 1033, 1036 (Miss. 1986).

[292] Rule 2.05 states in pertinent part:

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation against him. Formal or technical words are not necessary in an indictment, if the offense can be substantially described without them.

MISS. UNIF. CRIM. R. CIR. CT. PRAC. 2.05.

[293] *See* Bandy v. State, 495 So. 2d 486, 490-91 (Miss. 1986)(technical usage of term "violent crime" not defective provided one of crimes listed is recognized as violent type under recidivist statute, MISS. CODE ANN. § 99-19-83); McCullum v. State, 487 So. 2d 1335, 1338 (Miss. 1986)(indictment not defective despite minor technical infraction); Ingram v. State, 483 So. 2d 688, 689 (Miss. 1986)(technical words unnecessary where full notification of offense given); Johnson v. State, 475 So. 2d 1136, 1139 (Miss. 1985)(proper form of indictment).

[294] Atkins v. State, 493 So. 2d 1321, 1322 (Miss. 1986). *See also* Evans v. State, 499 So. 2d 781, 784 (Miss. 1986)(allowing amendment to indictment to correct variance between proof and indictment where such is immaterial, not prejudicial); Watson v. State, 483 So. 2d 1326, 1328 (Miss. 1986)(amendment to specify code section of crime sufficient to apprise defendant and court of crime charged).

ant, or court, of the exact charge the state seeks to bring against the accused.[295] With respect to multicount indictments, Mississippi jurisprudence has not allowed such type of indictments wherein separate offenses are stated.[296] With respect to the procedural law involving indictments, the court has asserted that no pretrial pleading could be used to test the sufficiency of the evidence where the accused has been indicted for a crime.[297]

Continuance

Only a few opinions were rendered this term pertaining to the granting of a continuance.[298] The Mississippi Supreme Court has maintained that generally the granting of a motion to continue is within the sound discretion of the trial court and, moreover, that a judgment will not be reversed based upon the refusal of a continuance, unless there has been an abuse of this discretion.[299] Of particular importance is the decision of *Gates v. State*[300] in which the court delineated the correct course that a defendant must pursue when applying for a continuance.[301] In *Gates*, the defendant appealed his murder conviction, contending that he should have been granted a continuance because of the unavailability of his material witness.[302] The court first noted that the

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[295] *See supra*, note 3.

[296] Brock v. State, 483 So. 2d 358, 362 (Miss. 1986). *See* Stinson v. State, 443 So. 2d 869, 872 (Miss. 1983)(multicount indictments not authorized in this jurisdiction); *cf.* Breckenridge v. State, 472 So. 2d 373, 375 (Miss. 1985)(conviction upheld under multicount indictment where proof same for each offense and no difference in punishment); Ward v. State, 461 So. 2d 724, 726 (Miss. 1984)(proceeded to trial since multicount indictment was not objected to but rather requested).

The Mississippi Legislature passed the Act of April 10, 1986, ch. 444, 1986 Miss. Laws 509 which allows two or more offenses to be charged in the same indictment with a separate count for each offense. Section 1 of the act denotes the type of offenses, their relationship to one another, the type of sentencing to be imposed and the jury's role with regard to a verdict.

[297] State v. Peoples, 481 So. 2d 1069, 1070 (Miss. 1986). The court held that a motion to quash could not be used for this purpose. *Id.*

[298] Dye v. State, 498 So. 2d 343 (Miss. 1986); Foster v. State, 484 So. 2d 1009 (Miss. 1986); Gates v. State, 484 So. 2d 1002 (Miss. 1986); Pool v. State, 483 So. 2d 331 (Miss. 1986).

[299] *See Gates*, 484 So. 2d at 1007 (no abuse of discretion in refusal to grant continuance); *Dye*, 498 So. 2d at 345 (trial judge has broad discretion in deciding when trial will commence and how long it will continue on daily basis).

[300] 484 So. 2d 1002 (Miss. 1986).

[301] *Id.* at 1006.

[302] *Id.* at 1005. Gates, while in his car with a female companion, saw his wife drive by in the company of another man. After Gates ordered her male companion to pull

defendant must properly meet the statutory, procedural requirements prescribed in section 99-15-29 of the Mississippi Code.[303] Additionally, the court quoted lengthy portions of the opinion in *King v. State*,[304] which outlined procedures governing timing of the application for a continuance, renewal of the application, and the proof necessary to support the continuance request.[305] The court held that since Gates did not present adequate proof to sustain his request and since there was no abuse of trial court discretion, the denial of the continuance was merited.[306] These recent decisions relating to the request for a continuance indicate a rigid adherence to the procedural mechanics embodied in the statutory law.[307]

DISCOVERY

Among the opinions which involve discovery issues, *Foster v. State*[308] presented a noteworthy discussion which dealt with undisclosed evidentiary reports not offered into evidence by either party. In *Foster*, the defendant appealed his armed robbery conviction[309] argu-

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over, an altercation erupted between the two men which culminated in the fatal shooting of the wife's male companion. *Id.* At his trial, Gates requested a continuance since a material witness, his female companion, would not be able to testify due to pregnancy complications. *Id.* The motion was overruled by the trial court and Gates was subsequently convicted. *Id.*

[303] *Id.* at 1005-06. MISS. CODE ANN. § 99-15-29 (1972) explicitly details the conditions for granting the continuance, as in the case of an absent witness. *Gates*, 484 So. 2d at 1005-06.

[304] 251 Miss. 161, 168 So. 2d 637 (1964).

[305] *Gates*, 484 So. 2d at 1006. *See* Lamar v. State, 63 Miss. 265, 271 (1885)(early opinion establishing rules of procedure regarding application for continuance).

[306] *Gates*, 484 So. 2d at 1007. Gates attached to his motion a letter from a doctor stating that his female companion was in the hospital and could not testify at the scheduled trial. Also attached was the affidavit of Gates, setting forth to what the woman would testify. The trial court overruled the motion since there was no proof that she was actually in the hospital except the letter from the purported physician. Gates made no attempt to introduce more evidence about her absence nor did he renew his motion at trial's end. Furthermore, Gates never produced the affidavit of the "attending" physician. *Id.*

[307] *See* Pool v. State, 483 So. 2d 331, 334-36 (Miss. 1986)(continuance denied if statutory requirements not met; failure to raise denial of continuance as ground for new trial bars that issue).

[308] 493 So. 2d 1304 (Miss. 1986).

[309] *Id.* at 1305. An Oxford jewelry store was robbed at gunpoint by a black male wearing a brown polyester shirt and a fishing hat. *Id.* The police discovered the shirt and hat within close proximity to the crime scene. *Id.* After Foster was positively identified from a lineup and after a routine search of his person revealed a pawn ticket for a diamond ring of the type taken during the robbery, Foster was charged and subsequently

ing that the state had violated Rule 4.06 of the Uniform Criminal Rules of Circuit Court Practice.[310] Such allegation was premised on the fact that the state had failed to disclose the existence of certain discoverable material, namely a lab report,[311] to either the defendant or the court.[312] The court noted that there existed an "independent obligation"[313] to disclose crime lab reports and other tests, regardless of whether the material was exculpatory in nature.[314] The opinion also discussed the effect of a determination that such an error existed.[315] The court conceded that there was a lack of case law on this subject,[316] yet pronounced that the best rule was the approach adopted by the state of Rhode Island which states: nondisclosure of a report by the state, regardless of the state's intention to utilize the material or not, is deemed a violation which justifies a reversal, notwithstanding any showing of prejudice to the defendant.[317] The court commented that

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found guilty of armed robbery. *Id.*

[310] *Id.* at 1306. Rule 4.06 reads in part:

> Discovery: The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test and photograph upon request and without further order the following:
> (1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial;
> (2) Copy of any recorded statement of the defendants to any law enforcement officer;
> (3) Copy of the criminal record of the defendant, if proposed to be used to impeach;
> (4) Copy of crime lab reports or report or any tests made;
> (5) Exhibit any physical evidence and photos to be offered in evidence; and
> (6) Copy of any exculpatory material concerning defendant.

MISS. UNIF. CRIM. R. CIR. CT. PRAC. 4.06.

[311] *Foster*, 493 So. 2d at 1306. The crime lab was given the articles of clothing for analysis. *Id.*

[312] *Id.*

[313] *Id.* at 1307. Subsection 4 of Rule 4.06 created this duty. *Id.* The court noted that the entire discussion regarding whether the discoverable material was exculpatory was therefore irrelevant. *Id.*

[314] *Id.* at 1307. *See* Fuselier v. State, 468 So. 2d 45, 56 (Miss. 1985)(recent case on duty to disclose all lab reports and other tests, regardless of whether exculpatory or not).

[315] *Foster*, 493 So. 2d at 1307. The lab report's contents were mentioned only by the prosecution's witness, a police officer. *Id.* The report was never viewed by the defense or the court and therefore both had to rely upon the officer's knowledge as to contents. *Id.* The officer revealed that the hair in the hat and on the shirt were of a black male. *Id.* at 1306-07. The court held it was not proper for the state to withhold the report and then offer unsupported testimony of its own witness to establish the report's contents. *Id.*

[316] *Id*; *see* Bracy v. State, 396 So. 2d 632, 633 (Miss. 1981)(undisclosed evidence not offered as evidence into trial by either party).

[317] *Foster*, 493 So. 2d at 1307-08. *See* State v. Adams, 481 A.2d 718, 724 (R.I.

such a position effectively would prevent the state from acting on its own in the capacity of a judge in deciding an issue of discoverability.[318] However, this decision did not establish any "per se" reversal rule for such violations since the court noted certain situations where reversal would not be necessary.[319]

Recent decisions have also illustrated the court's displeasure with parties who attempt to circumvent the discovery rules by pleading that the evidence was for impeachment purposes only and not discoverable.[320] Additionally, the court announced that although past decisions had stated, in the context of prosecutorial discovery violations, that Rule 4.06 was not an automatic exclusionary rule,[321] an order which excludes undiscovered evidence is the only appropriate remedy for Rule 4.06 violations.[322] Furthermore, the issue of failure to timely com-

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1984)(discoverable report compiled by prosecution who failed to disclose since it was not to be used at trial; violation required reversal). *But cf.* Hall v. State, 490 So. 2d 858, 859 (Miss. 1986)(state violated discovery rule by failing to turn over evidence but court did not reverse since evidence was not critical to case).

[318] *Foster*, 493 So. 2d at 1308. The court cited Hentz v. State, 489 So. 2d 1386 (Miss. 1986) for the proposition that a prosecuting attorney should make available to a defense attorney all material in his possession and let the defense attorney then decide whether or not material will be effective in defense of the case. *Hentz*, 489 So. 2d at 1388-89.

[319] *Foster*, 493 So. 2d at 1308. The court pointed out that there may be occasions when the trial judge has an opportunity to examine or when the appellate court has opportunity to review material in question; when such an examination allows a determination beyond a reasonable doubt that matter complained of would not have effected the trial's outcome, reversal may not be needed. *Id.* In *Foster*, both the trial judge and the court had to rely on the witness of the prosecutor. *Id*; *see* Gray v. State, 487 So. 2d 1304 (Miss. 1986)(duty of trial judge to give defense reasonable opportunity to interview newly discovered witness for prosecution); Henry v. State, 486 So. 2d 1209, 1211 (Miss. 1986)(clearly discoverable piece of documentary evidence was not divulged, yet was introduced into evidence); Foster v. State, 484 So. 2d 1009, 1011 (Miss. 1986)(nondiscovered evidence may be admitted at trial if adverse party allowed reasonable preparation time. *See generally* Box v. State, 437 So. 2d 19, 23-26 (Miss. 1983)(Robertson, J., concurring)(discussion of guidelines for application of Rule 4.06; opportunity not given to appellant to discover evidence).

[320] Coates v. State, 495 So. 2d 464, 467-68 (Miss. 1986)(supreme court was unwilling to allow defense to escape discovery by asserting that evidence was used only for purposes of impeachment). *See* Johnson v. State, 491 So. 2d 834, 836-37 (Miss. 1986)(court not willing to allow prosecution to evade discovery rules on basis that evidence is only impeachment tool).

[321] *Coates*, 495 So. 2d at 467. *See* Turner v. State, 415 So. 2d 689, 692 (Miss. 1982)(Rule 4.06 not automatic exclusionary rule).

[322] *Coates*, 495 So. 2d at 467. *See, e.g.*, Thomas v. State, 488 So. 2d 1343, 1344 (Miss. 1986)(failure to permit defense to inspect physical evidence requested pursuant to Rule 4.06 made evidence and testimony relating thereto inadmissible); Henry v. State, 484 So. 2d 1012, 1013-14 (Miss. 1986)(evidence excluded due to discovery violation).

ply with a defendant's motion to compel discovery was addressed and the court stated that a harmless error would result only if the record was void of any miscarriage of justice.[323]

Speedy Trial

With respect to the constitutional right which entitles the criminal defendant to a speedy trial, Mississippi has consistently administered the four-part balancing test espoused by the United States Supreme Court in *Barker v. Wingo*.[324] The application of this test was illustrated in four recent opinions by the Mississippi Supreme Court.[325] In *Beavers v. State*,[326] the court summarized the law regarding whether or not a defendant has received a speedy trial.[327] The first issue to be resolved before the balancing test is applied is the question of when does the speedy trial time clock start to run against the prosecution.[328] The court maintained that the right to a speedy trial attaches when the defendant is first accused of the offense.[329] In support of this time constraint, the court cited *Lightsey v. State*,[330] in which it expressed the view that the time of accusation is the time of arrest.[331] With refer-

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[323] McKinney v. State, 482 So. 2d 1129 (Miss. 1986). The defendant, McKinney, was convicted of armed robbery. *Id.* As an assignment of error, McKinney contended that the state failed to timely comply with discovery in respect to producing all written statements taken from witnesses. *Id.* at 1130. The court concluded that the failure of the state to respond to defendant's motion for discovery until the day before trial, combined with the trial court's failure to grant a continuance with respect to this matter, was not a harmless error. *Id*; *see* Buckhalter v. State, 480 So. 2d 1128, 1129 (Miss. 1985)(violation of Rule 4.06 harmless error under Rule 11 of Mississippi Supreme Court Rules unless from whole record there is miscarriage of justice).

[324] 407 U.S. 514 (1972). In *Barker*, the United States Supreme Court announced a balancing test which involved four factors: 1) length of delay; 2) reason for delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. *Id.* at 519-36.

[325] Kinzey v. State, 498 So. 2d 814 (Miss. 1986); Beavers v. State, 498 So. 2d 788 (Miss. 1986); Lightsey v. State, 493 So. 2d 375 (Miss. 1986); and Smith v. State, 489 So. 2d (Miss. 1986).

[326] 498 So. 2d 788 (Miss. 1986). Beavers argued on appeal that the state had denied his right to a speedy trial as almost 400 days passed before he was brought to trial. *Id.* at 789. Beavers further stated that such denial was the fact that an additional 216 days of unjustified delay followed his demand to be brought to trial. *Id.*

[327] *Id.* at 789-90.

[328] *Id.* at 789.

[329] *Id*; *see* Perry v. State, 419 So. 2d 194, 198 (Miss. 1982)(established that speedy trial time period began when defendant was accused).

[330] 493 So. 2d 375 (Miss. 1986). Lightsey was convicted on a burglary charge. *Id.* at 377. Lightsey assigned as error the fact that he was not brought to trial on his burglary charge until some fifteen months after his arrest. *Id.* at 379.

[331] *Id.* at 378. The court stated: "[t]o find Lightsey became an accused at the time of

ence to the familiar balancing test asserted in *Barker*, the Mississippi Supreme Court stated that no one factor within the totality of the circumstances context would be dispositive.[332] Weighing all the factors of the balancing test, the court concluded that Beavers had been denied his right to a speedy trial.[333]

In *Smith v. State*,[334] the court applied the *Barker* test to a unique situation where there had been a delay in prosecution of seven years. Such delay was the result of a circuit court order to suspend judicial proceedings since the insane defendant was not competent to stand trial.[335] In applying the test, the court reiterated the premise that no one factor was dispositive and thus held that not even a substantial amount of elapsed time would successfully end the inquiry.[336] However, the court observed that the cause for delay was one of the more important factors to consider in determining whether a speedy trial had been denied the defendant.[337] Delay in prosecution will not be characterized as a "per se denial" of the defendant's right to a speedy trial where the delay, though extended, was in good faith and for good reason.[338]

Another recent case of importance, *Kinzey v. State*,[339] addressed the issue of a delay in prosecution between mistrial and subsequent

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his indictment would foster a rule whereby a prisoner who had violated his parole and had been returned to prison could be held indefinitely before being tried on the pending charges." *Id.* at 378-79. *But cf.* Bailey v. State, 463 So. 2d 1059, 1062 (Miss. 1985)(point of accusation is at time of indictment).

[332] *Beavers*, 498 So. 2d at 790. *See* Burgess v. State, 473 So. 2d 432, 433 (Miss. 1985)(totality of circumstances must be considered).

[333] *Beavers*, 498 So. 2d at 792.

[334] 489 So. 2d 1389 (Miss. 1986).

[335] *Id.* at 1390. Billy Earl Smith, confined to the state mental hospital at Whitfield, attacked two hospital employees with an ice pick; one died and the other was seriously injured. *Id.* Smith was indicted, yet, because he was diagnosed as insane, the circuit court delayed the trial during Smith's confinement in the hospital. *Id.* Some seven years later, after the doctors asserted that he was competent to stand trial, Smith was arraigned and subsequently was found guilty as charged. *Id.* at 1391. Smith argued on appeal that his trial delay was unjust. *Id.*

[336] *Id.* at 1391.

[337] *Id.* at 1392. The length of delay between Smith's indictment and arraignment was substantial yet reasonable since it would have violated the defendant's right to conduct the trial while he was insane. *Id.* Once the defendant was found to be competent to stand trial, the circuit court acted promptly. *Id.* As to any prejudice caused the defendant, the court maintained that it was futile to argue that an insane defendant is better fitted to conduct his defense than a sane one. *Id.*

[338] *Id.*

[339] *Kinzey v. State*, 498 So. 2d 814 (Miss. 1986).

retrial.[340] On appeal, Kinzey argued that the substantial time interval between his original mistrial and his subsequent retrial not only violated section 99-77-1 of the Mississippi Code, but also his sixth amendment right to a speedy trial.[341] The court stated that section 99-17-1 required that indictments be tried only within the prescribed period of time after arraignment.[342] Furthermore, the majority concluded that the defendant's trial, despite the fact that it ultimately culminated in a mistrial, had satisfied the procedural time constraint.[343] In support of such a statutory construction, the court noted that it was in accord with other states which have held that the statutory requirement is still satisfied even though a mistrial results.[344] As to the time for retrial, such decision becomes a discretionary matter for the trial court that must only adhere to the constitutional standards of fairness incorporated in the right to a speedy trial.[345] Another important point in *Kinzey* was the determination by the court that a crowded docket at the trial court level created a justifiable reason for a delay in trial proceedings.[346] Justice Robertson dissented from such conclusion arguing that the majority of jurisdictions have rejected the concept that a crowded docket justifies delay.[347] As the dissent suggested, the major-

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[340] *Id.* at 815-16. Kinzey was retried 352 days after his mistrial.

[341] *Id*; *see* MISS. CODE ANN. § 99-17-1 (Supp. 1986)(indictments must be tried within 270 days of arraignment); *see also* Carlisle v. State, 393 So. 2d 1312, 1314 (Miss. 1981)(in some states, statutory period starts anew after mistrial; in other states, time of retrial is discretionary).

[342] *Kinzey*, 498 So. 2d at 816.

[343] *Id.* at 816.

[344] *Id.* at 816-17.

[345] *Id.* The court noted that the *Kinzey* decision was in accord with the conclusion reached in Ruester v. Turner, 250 So. 2d 264, 267 (Fla. 1971). *Ruester* held that a mistrial satisfied the statutory requirement and the time of retrial became a discretionary matter for the trial court. *Kinzey*, 498 So. 2d at 816. Also noted by the court was the fact that the discretion of the trial court was limited by constitutional standards of fairness. *Id.*

[346] *Kinzey*, 498 So. 2d at 816-17. *See* Diddlemeyer v. State, 398 So. 2d 1343, 1344-45 (Miss. 1981)(overcrowded docket was considered good cause for continuance); State v. Davis, 382 So. 2d 1095, 1097 (Miss. 1981)(same).

[347] *Kinzey*, 498 So. 2d at 819-20 (Robertson, J., dissenting). Justice Robertson added that case law in Mississippi did not warrant the conclusion that overcrowded dockets are good cause for delay. *Id.* Robertson also asserted that the ABA Standards Project and the Speedy Trial Act of 1974, 18 U.S.C. § 3161, were extensive efforts to alleviate the problem of delayed criminal trials. *Kinzey*, 498 So. 2d at 819-21. Robertson also astutely noted that the law in the Florida case of *Ruester* was no longer valid since Florida enacted a new law of criminal procedure effective January 1, 1981. *Id.* at 822. *See* FLA. STAT. ANN. R. CRIM. P. 3.191 (West 1981)(retrial must occur within 90 days of mistrial).

ity opinion may lead to additional delay.[348]

PROCEDURAL BAR — POST-CONVICTION RELIEF

In the 1986 term, the viability of the Uniform Post-Conviction Collateral Relief Act[349] has come under question.[350] In relatively recent cases the court has enforced the application of this statute which in part dictates that issues not raised on direct review are therefore waived and that issues addressed on direct review are *res judicata*, both of which are procedurally barred.[351] In two decisions rendered this year, the court followed the procedural tenets of the act.[352] However, in *Irving v. State*,[353] the court decided to give alternative grounds for resolution of the issues presented in the appeal[354] due to speculation that procedural bars were not regularly implemented.[355] At present, it appears moot as to whether or not the procedural bar will be applied with consistency.[356]

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Brenda Kay Tanner
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[348] *Kinzey*, 498 So. 2d. at 821.

[349] MISS. CODE ANN. §§ 99-39-1 to -29 (Supp. 1986).

[350] Irving v. State, 498 So. 2d 305, 308 (Miss. 1986).

[351] Stringer v. State, 485 So. 2d 274, 275 (Miss. 1986); Defour v. State, 483 So. 2d 307, 308 (Miss. 1985); Tokman v. State, 475 So. 2d 457, 457 (Miss. 1985); Leatherwood v. State, 473 So. 2d 964, 966 (Miss. 1985).

[352] Mann v. State, 490 So. 2d 910 (Miss. 1986); and Smith v. Smith, 490 So. 2d 860 (Miss. 1986). In *Mann*, the defendant applied for leave to file a motion to vacate judgment. *Mann*, 490 So. 2d at 911. The court said that claims and issues that could have been determined at trial or on direct appeal were now barred from review. *Id.* at 911. In *Smith*, the defendant filed motion for post-conviction relief to vacate a conviction for murder. *Smith*, 490 So. 2d at 860. Smith's allegations were not alleged as error on direct appeal. *Id.* at 861. The court held that questions could not now be raised on a motion for post-conviction relief. *Id.*

[353] *Irving*, 498 So. 2d 305 (Miss. 1986).

[354] *Id.* at 309. The court also noted MISS. CODE ANN. § 99-39-21 (Supp. 1985) allowing the court to consider matters normally procedurally barred "upon a showing of cause and actual prejudice." *Irving*, 498 So. 2d at 309.

[355] *Id.* at 309. *See* Wheat v. Thigpen, 793 F.2d 621, 625-27 (5th Cir. 1986)(court made finding that Mississippi Supreme Court did not consistently invoke procedural bar); Caldwell v. State, 481 So. 2d 850, 853 (Miss. 1985)(Mississippi Supreme Court addressed merits of claim raised for first time after direct appeal).

[356] *See supra* notes 6, 7.

MISCELLANEOUS

In 1986 the Mississippi Supreme Court rendered decisions in areas of law relating to child custody,[1] child support,[2] paternity,[3] divorce,[4]

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[1] Non-textually treated 1986 cases in the area of child custody include: Duran v. Weaver, 495 So. 2d 1355 (Miss. 1986)(material change in circumstances of non-custodial parent is not sufficient to modify custody); Keely v. Keely, 495 So. 2d 452 (Miss. 1986)(chancellor has no authority to substitute judgment of youth court referee for his own determination as to child custody); Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986)(absent finding of abandonment, immorality, or unfitness, natural parent will not be divested of custody); Cox v. Moulds, 490 So. 2d 866 (Miss. 1986)(something approaching actual danger or substantial detriment to children, not personal inconvenience or offense to middle-class sensibilities, required before chancellor may restrict visitation); G.M.R., Sr. v. H.E.S., 489 So. 2d 498 (Miss. 1986)(where both parents are found by clear and convincing evidence to be morally and mentally unfit, constructive abandonment and desertion of children may be found thus allowing foster parents to adopt); *In re* M.R.L., 488 So. 2d 788 (Miss. 1986)(supreme court will not reverse youth court's finding that children meet statutory definition of being in need of supervision unless reasonable men could not have reached same finding based on evidence shown); Rutledge v. Rutledge, 487 So. 2d 218 (Miss. 1986)(condition precedent to modification of child custody is finding of substantial change in circumstances adverse to child's welfare, e.g., move to Jackson not sufficient); Robinson v. Robinson, 481 So. 2d 855 (Miss. 1986)(error to grant temporary child custody to non-custodial parent absent urgent circumstances or notice to other parent).

[2] Those cases rendered dealing with child support included: Alexander v. Alexander, 494 So. 2d 365 (Miss. 1986)(where child support was paid directly to child while child was living with non-custodial parent, custodial parent had no cause of action for contempt for failure to pay); Jones v. Hargrove, 493 So. 2d 346 (Miss. 1986)(party held in civil contempt for failure to pay, then incarcerated, may be released pending appeal if appearance bond is posted pursuant to MISS. CODE ANN. § 15-15-12 (Supp. 1985)); Calton v. Calton, 485 So. 2d 309 (Miss. 1986)(parents cannot contract away child support rights because these rights are vested in minor children; therefore, contract not to sue for child support is void as against public policy); Brand v. Brand, 482 So. 2d 236 (Miss. 1986)(periodic child support payment became fixed and vested when due and unpaid; interest from date due should be paid crediting subsequent payments first against unpaid interest, then against unpaid principal).

[3] Paternity cases included: Harkins v. Fletcher, 499 So. 2d 773 (Miss. 1986)(admission of blood test reports without attendant expert testimony of performing doctor contravenes defendant's right to cross-examine; tests thus admitted are not properly authenticated and are inadmissible hearsay); Minor v. Dep't of Pub. Welfare, 486 So. 2d 1253 (Miss. 1986)(statute limiting mother's paternity action to one year from birth of child does not apply to paternity actions brought by Department of Public Welfare); Brabham v. Brabham, 483 So. 2d 341 (Miss. 1986)(presumption that child born in wedlock is legitimate may be overcome only by proof beyond reasonable doubt that husband is not father).

[4] The 1986 divorce cases included: Dillon v. Dillon, 498 So. 2d 328 (Miss. 1986)(ab-

separate maintenance,[5] adoption,[6] alimony,[7] wills and estates,[8] trusts,[9]

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sent showing of clear error or abuse of discretion, decree will not be set aside); Wood v. Wood, 495 So. 2d 503 (Miss. 1986)(after resumption of cohabitation, conduct which evidenced an intent not to perform the conditions of the condonation in good faith was sufficient to avoid defense of condonation); Devereaux v. Devereaux, 493 So. 2d 1310 (Miss. 1986)(revocation of divorce decree did not revoke prior decree to extent that parties were never divorced; thus, adultery could not be committed after divorce decree granted and prior to subsequent revocation); Alexander v. Alexander, 493 So. 2d 978 (Miss. 1986)(chancery court had no authority to grant contested divorce on ground of irreconcilable differences); Bias v. Bias, 493 So. 2d 342 (Miss. 1986)(traditional proximate cause rule, which legislatively authorized that grounds for divorce must be cause of spouses' separation, shall be limited so as not to cause denial of divorce where proof has been made of authorized grounds although one spouse had unsuccessfully sought divorce previously on that ground); Colvin v. Colvin, 487 So. 2d 840 (Miss. 1986)(although Uniformed Services Former Spouses' Protection Act provided that military retirement pay may be subject to division upon dissolution of marriage, Mississippi law still required material change in circumstances before divorce decree could be modified); Haralson v. Haralson, 483 So. 2d 378 (Miss. 1986)(divorce on ground of cruel and inhuman treatment required cruelty to be so gross, unfeeling and brutal as to render cohabitation impossible, except at risk of life or health to unoffending spouse); Etheridge v. Etheridge, 483 So. 2d 370 (Miss. 1986)(where proof shows cruel and inhuman treatment, chancellor may grant divorce on that ground).

[5] The 1986 decisions relating to separate maintenance included: Landrum v. Landrum, 498 So. 2d 1229 (Miss. 1986)(showing of material change in circumstances or subsequent divorce decree will suffice to modify separate maintenance decree); Gray v. Gray, 484 So. 2d 1032 (Miss. 1986)(same criteria used to determine amount of alimony are properly used to determine amount of separate maintenance).

[6] The only case not treated textually which related to adoption was *In re* Adoption of Baby Boy "B", 427 So. 2d 841 (Miss. 1986). The court held that while an unmarried adult might have standing to adopt as a sole petitioner, a legally married person whose spouse did not join in the adoption petition had no standing to adopt a child as a sole petitioner. *Id.* at 842. Upon separation, the husband withdrew his name from the adoption petition and the wife attempted to adopt as a sole petitioner. *Id.*

[7] The cases which dealt with alimony included: Bonderer v. Robinson, 502 So. 2d 314 (Miss. 1986)(recipient's illicit sexual activities did not automatically require alimony termination); Maxcy v. Estate of Maxcy 485 So. 2d 1077 (Miss. 1986)(because lump-sum alimony vested when decree was final, it was not subject to modification or termination upon death or remarriage); Tutor v. Tutor, 494 So. 2d 362 (Miss. 1986) (*Brabham v. Brabham* set forth controlling factors used in determining proper amount of alimony); East v. East, 493 So. 2d 927 (Miss. 1986) (if installment alimony payments do not terminate upon death of payor or remarriage of payee, but do end on death of payee, award is lump sum and not modifiable).

[8] Those 1986 cases regarding wills and estates included: Estate of Myers v. Myers, 498 So. 2d 376 (Miss. 1986)(successor administrator bound by legally performed acts of preceding administrator); Lee v. Estate of Polk, 497 So. 2d 815 (Miss. 1986)(absent showing of confidential relationship between testatrix and third party, no presumption of undue influence arises); *In re* Estate of Flowers, 493 So. 2d 950 (Miss. 1986)(actual knowledge of existence of heir and failure to disclose such is serious misrepresentation which may require administrator's removal); Holloway v. Jones, 492 So. 2d 573 (Miss.

insurance,[10] and a miscellany of other topics.[11] Textually discussed within this section will be two cases of first impression in Mississippi

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1986)(MISS. CODE ANN. § 91-1-15 (1972) stated remedy for all illegitimates regardless of date of death of intestate, provided appropriate action taken within three years of July 1, 1981); Harper v. Harper, 491 So. 2d 189 (Miss. 1986)(executrix and trustee have same standard of care); Trotter v. Trotter, 490 So. 2d 827 (Miss. 1986)(breach of contract not to revoke will may allow testator to rescind the contract, but does not revoke will itself); Estate of Senour v. Hollingsworth, 487 So. 2d 811 (Miss. 1986)(statutory limits upon amount of executor's fees are based upon entire personal estate actually accounted for and are discretionary within those limits; attorney's fees are discretionary, based upon reasonable compensation); Ford v. Hegwood, 485 So. 2d 1044 (Miss. 1986)(conveyance by instrument in form of deed should be adjudicated testamentary and subject to statute of wills only where testamentary nature affirmatively and clearly appeared from language of instrument); Estate of Bunch v. Heirs of Bunch, 485 So. 2d 284 (Miss. 1986)(where will showed testator's general intention that his property be applied to charitable purpose, court can and must take supplementary and administrative provisions to implement that purpose); Liddell v. Jones, 482 So. 2d 1131 (Miss. 1986)(agreement to care for decedent may be recovered from estate in quantum meruit only if evidence showed existence of express or implied contract).

[9] The only case not treated textually with regard to trusts was Estate of Bunch v. Heirs of Bunch, 485 So. 2d 284 (Miss. 1986). *See supra* note 8.

[10] The decisions rendered in the insurance area included: Mississippi Farm Bureau v. Todd, 492 So. 2d 919 (Miss. 1986)(where insurer entered contract with full knowledge, insurer is bound by valued policy statute to pay face amount of policy even if higher than insurable interest amount); Employers Mut. Casualty Co. v. Tompkins, 490 So. 2d 897 (Miss. 1986)(award of contractual damages in excess of verdict for actual damages against an uninsured motorist is excessive; continued use of void exclusion provision gave rise to punitive damage cause of action); Roberts v. Grisham, 487 So. 2d 836 (Miss. 1986)(for liability to attach under uninsured motorists coverage provision acts committed at time wrongful cause set in motion must have arisen out of either maintenance, operation, or use of vehicle *and* must have continued in unbroken sequence to cause plaintiff's injury; intentional murder by gunshot did not meet standard); Aetna Casualty Ins. v. Day, 487 So. 2d 830 (Miss. 1986)(general rule is that absent peremptory instruction on contract liability, insurance company is insulated from punitive damage instruction); Weems v. American Security Ins. Co., 486 So. 2d 1222 (Miss. 1986)(bad faith/punitive damages claim is separable from contract claim, thus absence of arguable reason does not automatically lead to assessment of punitive damages); Blue Cross v. Larson, 485 So. 2d 1071 (Miss. 1986)(to determine which of two insurance contracts is primarily liable for claim, look to protection intended by each contract, primary or contingent).

[11] Decisions concerning other areas of the law included: Shannon v. Henson, 499 So. 2d 758 (Miss. 1986)(MISS. R. CIV. PROC. 7(a) applied to election contests held before special tribunal where no conflict between election statute and rule existed; absence of attesting witness's signature on absentee ballot envelope was departure from fundamental provision of election code); Leonard v. Leonard, 486 So. 2d 1240 (Miss. 1986)(absent unusual circumstances, a bona fide setting in one court entitled attorney to continuance of another case subsequently set); City of Jackson v. Pittman, 484 So. 2d 998 (Miss. 1986)(absent express constitutional or legislative authority, only legislature can exempt property from county or municipal taxation).

which dealt with child custody[12] and expert witnesses[13] respectively; a case which addressed grandparents' visitation rights and ultimately caused a subsequent amendment to the Mississippi statutes;[14] a case which allowed equitable distribution of assets accumulated between an unmarried couple;[15] and a case which dealt with Mississippi's mortmain statute.[16]

I. Family Law

A. *Removal of Child to Foreign Nation by Custodial Parent Does Not Meet Material Change in Circumstance Standard*

In *Spain v. Holland*,[17] the Mississippi Supreme Court addressed a question of first impression in the area of child custody. The question addressed was whether the chancery courts of this state should interfere with a divorced custodial parent's planned movement of minor children to a foreign nation incident to that parent's pursuit of a reasonable professional or economic opportunity.[18] The noncustodial

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[12] Spain v. Holland, 483 So. 2d 318 (Miss. 1986).

[13] Mississippi Farm Bureau v. Garrett, 487 So. 2d 1320 (Miss. 1986).

[14] Olson v. Flinn, 484 So. 2d 1015 (Miss. 1986). The statutes changed were Miss. Code Ann. §§ 93-16-3 to -7 (Supp. 1986).

[15] Pickens v. Pickens, 490 So. 2d 872 (Miss. 1986).

[16] Johnson v. Board of Trustees, 492 So. 2d 269 (Miss. 1986).

[17] 483 So. 2d 318 (Miss. 1986).

[18] *Id.* at 318. However, other jurisdictions have addressed this particular issue. The court cited several cases, all of which allowed the custodial parent to remove the child to the foreign country and denied the requested custody change. *Id.* at 321. In the case of *In re* Marriage of Ditto, 52 Or. App. 609, 628 P.2d 777 (1981), the custodial mother wished to move to New Zealand to remarry. *Id.* at 778. However, the divorce decree specifically stated that to insure adequate visitation to the non-custodial parent, the custodial parent could not move the children's residence outside the state without written agreement of the parties or court order. *Id.* The Oregon court stated that the significance of such a provision in the decree was purely procedural. However, the court stated that in all cases the trial court must determine whether the move was in the best interests of the children. *Id.* Finding that the record supported the trial court's determination that it was in the best interest of the children to go to New Zealand with the custodial mother, the court affirmed the trial court's denial of the father's petition for custody chance. *Id.*

In Viltz v. Viltz, 384 So. 2d 1348 (Fla. App. 1980), the Florida court addressed the same issue from a slightly different aspect. The custody of a 3-year-old daughter was awarded to the mother under a judgment which prohibited the mother from removing the child from the United States without a court order. *Id.* at 1348. The mother successfully obtained the court order. *Id.* On appeal, the court held that based on the record, i.e., the mother's family lived in Venezuela, the move was not intended to be permanent, the couple had lived in Venezuela prior to divorce, and child support was suspended while the child was in Venezuela, it was in the best interest of the child to continue in

mother[19] alleged in her motion to modify child custody[20] that her ex-husband's move to England constituted a material change of circumstances which adversely affected the welfare of the children.[21] The trial court held in its formal order that there had been no material change in circumstance subsequent to the divorce decree date; it therefore denied the modification request.[22] Upon appeal, the mother argued that the chancellor had erred because the intended move would cause irreparable harm to the children due to their prolonged separation from her.[23] In affirming the trial court's denial,[24] the court stated that the major consideration in any child custody case was the welfare of the children.[25] The court noted that the welfare of the children was consid-

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the custody of the mother and go to Venezuela. *Id.* at 1349. Thus the court affirmed the trial court's denial of a custody modification. *Id.*

Although the Mississippi Supreme Court had not addressed this exact issue, it had addressed the removal of a child to a foreign country in a slightly different factual situation. In Turner v. Turner, 331 So. 2d 903 (Miss. 1976), a custodial mother requested and allowed the paternal grandparents of her daughter to keep the child for several extended periods of time at their home in Bruce, Mississippi. *Id.* at 903-04. The mother was a citizen of the Isle of Malta and lived in New York City. *Id.* at 904. Upon arriving in Bruce to take the child to Malta with her and being denied custody of her daughter, the mother filed a habeas corpus suit against the grandparents' wrongful withholding of the child. *Id.* The supreme court held that absent clear and convincing evidence of abandonment or unfitness, as to a third party, a natural parent is entitled to custody. *Id.* at 906. Although analogous, this case is distinguishable because it involved a non-parent third party.

[19] *Spain*, 483 So. 2d at 319. Allen E. Holland and Kimberly L.J. Holland were divorced on February 4, 1983. *Id.* The two minor children, Heather and Ryan, then 5 and 3 years old respectively, were placed in the care and custody of the father. *Id.* The mother was given reasonable visitation rights. *Id.*

[20] *Id.* On December 29, 1983, Kimberly Holland Spain, who remarried approximately 6 months after her divorce, filed her motion to modify the February 4, 1983 decree. *Id.*

[21] *Id.*

[22] *Id.* The chancellor's formal order dated February 24, 1984, found "that there has not been a material substantial change of circumstances since February 4, 1983, the date of the decree of divorce in these premises." *Id.* However, in his opinion at trial on February 7, 1983, the chancellor expressly stated "that there has not been a material change of circumstances . . . which . . . affects the children's welfare adversely." *Id. See infra* text and notes 28-34 (adverse effects prong).

[23] *Spain*, 483 So. 2d at 320. She further alleged that Allen Holland had not remarried, had volunteered for the England duty, knew no one in England, and had no relatives in England. *Id.* She asserted that the children would be able to visit with her once a year for only a few weeks. *Id.*

[24] *Id.*

[25] *Id.* In Albright v. Albright, 437 So. 2d 1003, 1004 (Miss. 1983), the court addressed the application of the "tender years" doctrine as it applied to child custody. The "tender years" doctrine favors awarding the mother custody of young children because

ered in child custody proceedings[26] and a change in custody required a showing, in view of the totality of the circumstances,[27] that not only had a material change in circumstances occurred,[28] but also that this

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they require a mother's care for physical welfare. *Id.* at 1004. The court held that although its application was not absolute, it was a factor to be considered in determining which parent would have custody of the child. *Id.* at 1005. In *Albright*, the father challenged the custody given to the mother under the "tender years" rule as a violation of his equal protection rights, mandated by the 14th amendment. *Id.* at 1004. The court did not address the constitutional question because it stated that MISS. CODE ANN. § 93-13-1 (1972) afforded an independent and adequate remedy. *Albright*, 437 So. 2d at 1004. However, the court held that the polestar consideration in all child custody cases was the best interest and welfare of the child. *Id.* at 1005. Justice Prather further stated that the age of the child was only one of several factors to be used and given equal weight in determining the best interest of the child. *Id.* The court then listed a multiplicity of factors relating to the individual child, each parent, and each parent's physical and moral environment. *Id.* at 1005.

[26] *Spain*, 483 So. 2d at 320. The court noted that the welfare of the children had been judicially determined at the time of the divorce and granting of custody to Allen Holland. *Id.*

[27] *Id.* The totality of the circumstances test is applied to child custody cases in Mississippi. In Kavanaugh v. Carraway, 435 So. 2d 697 (Miss. 1983), a father filed to modify custody because the custodial mother had allowed her present husband to live with her and the children approximately 5 weeks before her second marriage. *Id.* at 699. The Mississippi Supreme Court reversed the trial court's modification because it found that the chancellor had focused entirely on the one-month-prior-to-marriage living arrangements. *Id.* The chancellor failed to address the care and circumstances of the children prior to and during that period. *Id.* The *Kavanaugh* court, citing Woodruff v. Woodruff, 418 So.2d 775 (Miss. 1982), a factual twin to *Kavanaugh*, stated that the brief cohabitation was not sufficient to constitute a material change in circumstances that adversely affected the child. *Kavanaugh*, 435 So. 2d at 699-700. The court stated further that when viewing the totality of the circumstances, the trial court must keep the best interest of the child in mind. *Id.* Finding that under the totality of the circumstances test the evidence in this case did not warrant a change in custody, the court reversed. *Id.* at 701.

[28] *Spain*, 483 So. 2d at 320. In Tucker v. Tucker, 453 So. 2d 1294 (Miss. 1984), original custody of the daughter was given to the mother. *Id.* at 1296. However, three years later, custody was changed to the father. *Id.* Approximately seven months later, during visitation, the mother found bruises on the child's body. *Id.* The mother filed for custody change. *Id.* Applying the totality test, the court held that an isolated incident such as striking a child does not meet the material change in circumstances adversely affecting the child's welfare standard. *Id.* at 1297. The court stated that the trial court must find that the overall circumstances in which a child lives have materially changed, are likely to remain changed, and will adversely affect the child. *Id.* Furthermore, the court set forth a three-prong test. Stating that even if the chancellor found a material change, that fact alone did not automatically require custody change. *Id.* The chancellor must then determine that it adversely affected the child. *Id.* Finally, even if the two prongs above are present, the best interest of the child is the polestar consideration. *Id.* *See also*, Denney v. Denney, 453 So. 2d 693, 694 (Miss. 1984)(non-custodial mother failed to meet burden of proving material change; best interests of child dictated no

change was one which adversely affected the children.[29] Noting that the chancellor had expressly found that the intended move was not a material change in circumstances which adversely affected the children,[30] the court stated that a move to England was in fact a major change in their lives. Thus the court found that the chancellor had implicitly held as a matter of ultimate fact[31] that this intended move did not adversely affect the children.[32] Therefore, to insure clarity, the court explained its meaning of the phrase "adverse effect."[33] Stating that any child would be adversely affected by the divorce of his or her parents and by a change of residence to a distant city, the court held that to change child custody, the law must require something beyond those attendant adverse effects which result from (a) the divorce and (b) the geographical separation from one parent.[34] The court further explained that because our society is a mobile one,[35] prior decisions had determined that movement by the custodial parent to another state did not create a material change in circumstances which required a change in child custody.[36] The court thus concluded that it was legally irrelevant to the matter of permanent custody that the distant move of the children would curtail the non-custodial parent's visitation rights.[37] Therefore, by analogy, the move to a foreign country did not *per se* create an adverse impact upon the children so as to require a change in parental custody.[38] Based upon the fact that the father had a

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change in custody).

[29] *Spain*, 483 So. 2d at 320. *See supra* note 13.

[30] *Spain*, 483 So. 2d at 320.

[31] *Id.* The court stated that the critical point was the chancellor's implicit determination of a lack of adverse effect. *Id.*

[32] *Id.* at 320-21.

[33] *Id.*

[34] *Id.* at 321. The court *inter alia* noted that the adverse effects created by a divorce and either parent's move would not be solved by a change of custody, because the separation from either parent, in theory, would adversely affect the child. *Id.*

[35] *Id.* The court stated that opportunity and economic necessity ordinarily create situations where perfectly responsible persons must move many miles from their present homes. *Id.*

[36] *Id.* The court cited Brocato v. Walker, 220 So. 2d 340, 344 (Miss. 1969), for the proposition that a move by a custodial parent of 600 miles to Texas was insufficient to change child custody. *Spain*, 483 So. 2d at 321. The court further cited Pearson v. Pearson, 458 So. 2d 711, 713 (Miss. 1984), which held that a Coast Guard officer/custodial father's move to his new station in Hawaii was also insufficient for modification of child custody. *Spain*, 483 So. 2d at 321.

[37] *Spain*, 483 So. 2d at 321.

[38] *Id.*

legitimate professional opportunity which necessitated the move,[39] the finding of the chancellor, that such move did not adversely affect the children, was an implicit finding of ultimate fact,[40] which, upon review, the court concluded was not manifestly wrong.[41]

B. *Chiropractor May Testify as An Expert Witness if the Opinion is Within His Field and He is Properly Qualified*

Mississippi Farm Bureau Mutual Insurance Co. v. Garrett[42] presented the Mississippi Supreme Court with two distinct questions, one of which was of first impression. John Allan Garrett was injured[43] when the car in which he was a passenger was hit by another vehicle.[44] Garrett was hospitalized and required subsequent treatment.[45] Almost a year after the accident, Garrett fell;[46] he then sought treatment from a chiropractor.[47] Although Garrett had previously settled[48] with his in-

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[39] *Id.* The court stated that since it could find no *per se* basis for altering child custody in *Pearson*, it could find no *per se* reason for altering child custody in the case *sub judice*. *Id.* The court, however, expressly noted that this determination did not foreclose consideration by trial courts where peculiar or unusual circumstances adversely affect the child, beyond that caused by the increase in miles between the child and noncustodial parent. *Id.*

[40] *Id.* Citing Culbreath v. Johnson, 427 So. 2d 705, 707-08 (Miss. 1983), the court noted that findings of fact made by a trial judge may not be disturbed on appeal unless the appellate court found them to be manifestly wrong. *Spain*, 483 So. 2d at 320. The court noted further that this standard was proper whether the fact be found expressly or implicitly, Bryant v. Cameron, 473 So. 2d 174, 179 (Miss. 1985), or whether the fact be evidentiary or ultimate, Cotton v. McDonnell, 435 So. 2d 683, 685 (Miss. 1983). *Spain*, 483 So. 2d at 320.

[41] *Spain*, 483 So. 2d at 321. Thus the court's review of the fact question herein — the material change in circumstances adversely affecting the welfare of a child — was limited by the "manifestly wrong" standard. *Id. See* Tucker v. Tucker, 453 So. 2d 1294, 1296-97 (Miss. 1984)(three-prong material change test).

[42] 487 So. 2d 1320 (Miss. 1986).

[43] *Id.* at 1322.

[44] *Id.* Garrett was one of three passengers in a car owned and driven by Dorothy Yarbro, an insured motorist. *Id.* Yarbro's car was hit by a car driven by E.B. Smith, an uninsured motorist. *Id.*

[45] *Id.* After a seven or eight day post accident hospitalization, Garret was treated for approximately four and one-half months by a Memphis physician and released. *Id.*

[46] *Id.* Garrett stumbled over a branch or twig. *Id.*

[47] *Id.* Dr. Tillman first treated Garrett on November 25, 1981. *Id.* Garrett told Dr. Tillman about the fall and his injury. *Id.* He stated further that his injury now felt the same as it had after the wreck. *Id.*

[48] *Id.* All four occupants of Yarbro's car settled with Dairyland, Yarbro's insurer. *Id.* Garrett received $7,517 under the uninsured motorists (UM) coverage and $1,000 under the liability coverage. *Id.* The three other occupants received settlements aggregating

sured host driver's insurance company under the uninsured motorists (hereinafter UM) provision,[49] he filed claims with his own insurance company under his UM clause.[50] After his insurance company refused to pay, Garrett filed suit.[51] Garrett received a jury award of $30,000.[52]

The question of first impression[53] addressed by the court was whether a chiropractor is precluded from giving opinion testimony where the subject of the opinion is within the field of chiropractory.[54] In determining that he was not so precluded,[55] the court set forth the necessary criteria for qualifying as an expert witness: (1) the opinion be in the field of chiropractory as practiced and (2) the witness be properly qualified in that field.[56] The court noted that for expert testimony in any field to be admissible that field must be one in which it has been scientifically established that a valid opinion will be produced through due investigation and study in conformity with generally accepted methods and practices.[57] Giving great weight to the legislative determi-

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approximately $9,400. *Id.* Therefore, approximately $16,917 of the $20,000 per occurrence UM coverage was exhausted. *Id.*

[49] *Id.* The UM provision of Yarbro's policy came into play because E.B. Smith was an uninsured motorist and the facts indicated that he was wholly at fault. *Id.*

[50] *Id.* Garrett had three automobile insurance policies with Farm Bureau. *Id.* Each policy contained $10,000 per person uninsured motorist coverage. *Id.*

[51] *Id.* On June 27, 1981, Garrett filed suit against Farm Bureau alleging that his damages from the accident exceeded that amount received from the settlement with Dairyland. *Id.* He requested judgment for the entire stacked amount of $30,000. *Id.*

[52] *Id.*

[53] *Id.* at 1325. The general rule in other jurisdictions is that in a personal injury case a chiropractor is competent to give opinion testimony as to the probable cause, duration, permanence and future treatment of the patient, provided that the testimony is within the field of chiropractory and a proper foundation is laid for the qualification of the witness. *Id.*; *see* Annotation, *Chiropractor's Competency as Expert in Personal Injury Action as to Injured Person's Condition, Medical Requirements, Nature and Extent of Injury, and the Like*, 53 A.L.R. 2d 1384 (1957)(chiropractor qualified as expert in personal injury action).

[54] *Farm Bureau*, 487 So. 2d at 1325. The chiropractor was called and qualified as an expert witness at trial. *Id.* He testified as to his diagnosis of Garrett's condition, his opinion that the wreck was the cause of the condition, future disability, pain and suffering, and mental and emotional anguish. *Id.*

[55] *Id.* at 1327.

[56] *Id.* at 1321.

[57] *Id.* at 1326. *See* Hardy v. Brantley, 471 So. 2d 358, 366 (Miss. 1985)(field of medical science is field of expertise where expert testimony may be given); House v. State, 445 So. 2d 815, 822 (Miss. 1984)(field must be such that scientifically established methods will produce valid opinion; hypnotists may not give expert testimony as to "facts" learned from hypnotized defendant).

For an excellent overview of expert testimony admissibility, see United States v. Downing, 753 F.2d 1224 (3d Cir. 1985), which held it was error not to allow defendant to

nation that the field of chiropractory and its practitioners must be licensed and regulated[58] in a manner similar to that used for other learned professions, the court held that the field of chiropractory met the requirement set forth above.[59] The second requirement for expert testimony to be admissible was that the subject matter of the opinion must assist the trier of fact.[60] Since expert testimony was obviously needed due to the nature, cause, and extent of the injuries,[61] the court stated that the final inquiry for the trial court as to expert testimony was whether this particular witness was qualified to give the subject matter testimony required.[62] Citing *Hall v. Hilbun*,[63] the court reiterated the proper criteria.[64] Because the chiropractor qualified as an expert and limited his testimony to the field of chiropractory,[65] the court

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adduce expert testimony concerning the reliability of eyewitness identification from psychologist. *See also* Giannelli, *The Admissibility of Novel Scientific Evidence; Frye v. United States A Half Century Later*, 80 COLUM. L. REV. 1197 (1980); MISS. R. EVID. 702 (citing *House* and *Hardy*).

[58] *Farm Bureau*, 487 So. 2d at 1326. The court cited MISS. CODE ANN. § 73-6-1 (Supp. 1985), which defines the practice of chiropractory, and MISS. CODE ANN. § 73-6-13 (Supp. 1985), which lists the requirements for applicants for a chiropractic license. *Farm Bureau*, 487 So. 2d at 1326. These requirements consist generally of two academic years in an accredited institution of higher learning, four years at a school or college of chiropractory, examination by the Board of Chiropractic Examiners, and not less than 40 clock hours of instruction in the operation of x-ray machinery and x-ray interpretation and diagnosis. *Id. See also* Norville v. Mississippi State Medical Assoc., 364 So. 2d 1084, 1087 (Miss. 1978)(operation and interpretation of x-rays is area of expertise within scope of chiropractic practice).

[59] *Farm Bureau*, 487 So. 2d at 1326.

[60] *Id.* at 1326-27. *See supra* note 16 and accompanying text. The court noted that although MISS. R. EVID. 702 was not in effect when the case was heard at trial, *Hardy*, the rule and *Garrett* were consistent. *Farm Bureau*, 487 So. 2d at 1326-27. *See also* Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 315 (Miss. 1985)(listing of various types of cases where expert witness testimony allowed); Boggs v. Eaton, 379 So. 2d 520, 523-24 (Miss. 1980)(expert may be qualified in other fields, such as real estate, cotton brokering, auto mechanics or plumbing).

[61] *Farm Bureau*, 487 So. 2d at 1326.

[62] *Id.* A further requirement for admission of expert testimony was that the witness must be qualified in fact. *Hardy*, 471 So. 2d at 366. *See also* Hollingsworth v. Bovaird Supply Co., 465 So. 2d 311, 314-15 (Miss. 1985)(within court's discretion to allow accident reconstruction expert witness if properly qualified).

[63] 466 So. 2d 856 (Miss. 1985).

[64] *Farm Bureau*, 487 So. 2d at 1326. The *Hall* court stated that a witness may be "qualified as an expert by knowledge, skill, experience, training or education (or a combination thereof), coupled with independence and lack of bias." *Hall*, 466 So. 2d at 873.

[65] *Farm Bureau*, 487 So. 2d at 1327. Dr. Tillman met all the licensing requirements of the state and was in fact a licensed and practicing chiropractor. *Id.* Each question was prefaced with the limiting phrase "with a reasonable degree of chiropractic probability?"

held that his testimony as an expert witness as to the diagnosis, causation and prognosis of Garrett's injury was proper.[66]

The second question addressed by this court was to what extent a guest passenger injured in an automobile accident[67] may settle with his host driver's separate UM insurer[68] without impairing his rights against his own UM coverage.[69] The court refused to accept the insurer's argument that exhaustion of the host's UM coverage as a condition precedent to Farm Bureau's liability to pay,[70] and concluded that the word "available" in the policy's UM clause referred to those sums "reasonably obtainable" by the injured.[71] Factors to be considered in determining the amount an insured may reasonably obtain were the nature and extent of the injuries,[72] facts regarding the liability of the

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Id. Therefore, even though the opinions which Dr. Tillman gave were within the scope of chiropractory and were also within the scope of medicine, the court found this to be of no import. *Id.* The court stated that the proper focus was whether Dr. Tillman, by his education, training, experience, and learning, was qualified to give the opinions which he was asked to give. *Id.*

[66] *Id.*

[67] *Id.* at 1326. *See supra* note 3.

[68] *Farm Bureau*, 487 So. 2d at 1326. *See supra* note 7 and accompanying text.

[69] *Farm Bureau*, 487 So. 2d at 1326. *See supra* notes 9-10 and accompanying text.

[70] *Farm Bureau*, 487 So. 2d at 1326. The argument turned on the construction given the uninsured motorists coverage section of each of Garrett's Farm Bureau policies:

> With respect to bodily injury or property damage sustained by an insured while occupying or being struck by an automobile not owned by the principal named insured, the insurance under this endorsement shall apply only as excess insurance over any other similar insurance available to each insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount of which the limit of liability for this coverage exceeds the applicable limit of liability of such insurance.

Id.

[71] *Id.* at 1323. The court noted that the construction given by Farm Bureau had little relationship to the real world, because any personal injury claim asserted against an insurer has other attendant costs and risks. *Id.* The Dairyland policy's per person limit of $10,000 and its per occurrence $20,000 limit were factors to be considered in determining whether any settlement figure was reasonable. *Id.* These limits were not contractual requirements which would mandate an injured to turn down a reasonable settlement offer, pursue the insurer to trial with its incident costs, and risk the possibility of no recovery. *Id.* Thus Garrett's settlement for $7,517 was held to be prima facie reasonable. *Id.*

The court noted that based on State Farm Mut. Auto. Ins. Co. v. Acosta, 479 So. 2d 1089, 1091 (Miss. 1985), because there were two or more claimants, the per occurrence coverage was activated. *Farm Bureau*, 487 So. 2d at 1324. Thus, Garrett's refusal to accept a settlement and proceed to trial may have been for naught, if the other claimants had previously exhausted this fund. *Id.*

[72] *Farm Bureau*, 487 So. 2d at 1324. *See supra* note 4 and accompanying text.

uninsured motorist[73] and the amount of the settlement offered[74] discounted by the costs and risks of seeking a greater sum.[75] The court further shunned Farm Bureau's argument that the "applicable limit of liability" language in the other insurance provision[76] referred to the per person limit which was not exceeded and therefore Farm Bureau's UM provision was not activated.[77] Finding this phrase ambiguous,[78] the court construed the ambiguity in favor of the insured.[79] Thus, the court held that pursuant to the insured guest passenger's own UM policy, he may secure a settlement or recover all that is reasonably available from his host driver's separate UM coverage. Upon exhausting such means, the injured guest passenger could then resort to his own UM coverage to the extent of his damages or the limits of liability.[80]

C. Grandparents' Visitation Rights Act As Construed and Amended

Olson v. Flinn[81] presented the Mississippi Supreme Court with its first opportunity to interpret the Grandparents' Visitation Rights Act.[82] The natural parents of John Jeffery Olson were divorced.[83] Sub-

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[73] *Farm Bureau*, 487 So. 2d at 1324. *See supra* note 8 and accompanying text.

[74] *Farm Bureau*, 487 So. 2d at 1324. *See supra* note 7 and accompanying text.

[75] *Farm Bureau*, 487 So. 2d at 1324. *See supra* note 33 and accompanying text.

[76] *Farm Bureau*, 487 So. 2d at 1324. *See* note 31 (text of clause).

[77] *Farm Bureau*, 487 So. 2d at 1324.

[78] *Id.* Justice Robertson stated: "When more obscure sentences are written, a major source will be the pens of the draftsmen of insurance policies. The sentence at issue is actually one of the less offensive — it is only ambiguous." *Id.*

[79] *Id. See* Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984)(ambiguity should be resolved in favor of insured).

[80] *Farm Bureau*, 487 So. 2d at 1324. Noting that the language of the clause used the phrase "shall apply," the court held "the Farm Bureau uninsured motorist coverage *shall apply* to the extent Garrett's damages exceed $7,157.00." *Id. See* Harthcock v. State Farm Bureau Mut. Auto Ins. Co., 248 So. 2d 456 (Miss. 1971)(injured party could recover under secondary policy for damages sustained over amount received in prior settlement subject to limits of liability).

[81] 484 So. 2d 1015 (Miss. 1986).

[82] *Id.* In 1983 the Mississippi legislature passed a series of statutes which allowed grandparents to petition the chancery court for visitation. *Id.* at 1017; *see* §§ 93-16-1 to -7 (Supp. 1985)(grandparents have visitation rights to grandchildren). MISS. CODE ANN. § 93-16-3 set up three situations in which grandparents had the right to petition: (1) whenever there had been a court-ordered award of custody of a minor child to one parent, (2) termination of the parental rights of one of the natural parents, or (3) whenever one of the parents had died. *Olson*, 484 So. 2d at 1017. However, the right of petition applied only to the grandparents whose child had been divested of parent rights or had died. *Id.* For examples of other state statutes which allow some form of grandparent visitation rights, see ALA. CODE § 30-3-4 (1983); FLA. STAT. ANN. § 61-13-(2)(b)(c) (1985); GA. CODE

sequent to the divorce, John visited with his noncustodial father and paternal grandmother often.[84] However, after the accidental death of John's father, visitation with his paternal grandmother was curtailed.[85] After John's mother remarried, the visitation ceased.[86] Mrs. Olson petitioned the chancery court for visitation under the newly enacted statutes.[87] However, before the petition was heard, John's stepfather adopted him.[88] Consequently, Mrs. Olson's petition was dismissed[89] and she appealed.[90]

The court addressed the specific issue of whether the subsequent adoption of a child by a stepfather terminated the rights of a grandparent who had previously petitioned the chancery court seeking visitation rights under section 93-16-3 of the Mississippi Code.[91] The court held that the adoption did in fact terminate the grandparent's rights.[92] Noting that at common law the grandparents had no legal rights for visitation absent parental permission,[93] the court acknowledged the

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ANN. § 19-7-3 (1982); LA. REV. STAT. ANN. § 9:572 (West Supp. 1986); TENN. CODE ANN. § 36-6-301 (Supp. 1985).

See also Borzi, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U.L. REV. 387, 392 (1977)(overview of state statutes which provide grandparents visitation rights); Gault, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 474, 480-81 (1973)(common law rationales used to deny grandparents the right to visit grandchildren).

[83] *Olson*, 484 So. 2d at 1016. John was only ten months old at the time of the divorce. *Id.*

[84] *Id.*

[85] *Id.* After John's natural father was killed in an automobile accident, John's mother moved with John in February of 1982. *Id.*

[86] *Id.* Jeri Olson, John's mother, married Buck Flinn in December, 1982. *Id.*

[87] *Id.* On April 2, 1984, with no voluntary recourse available, Mrs. Olson petitioned the Chancery Court of Adams County seeking court-ordered visitation rights pursuant to MISS. CODE ANN. § 93-16-3. *Olson*, 484 So. 2d at 1016.

[88] *Olson*, 484 So. 2d at 1016. On April 23, 1984, Buck Flinn adopted John. *Id.* John's name was legally changed to John Jeffrey Olson Flinn. *Id.*

[89] *Id.* Mrs. Flinn filed a motion to dismiss stating that under MISS. CODE ANN. § 93-16-7, Mrs. Olson had no right to seek grandparent visitation because of the adoption. *Olson*, 484 So. 2d at 1016. The chancellor agreed. *Id.*

[90] *Olson*, 484 So. 2d at 1016. Mrs. Olson appealed, asserting that the statute did not apply because she had filed for visitation *before* the adoption proceeding had begun. *Id.*

[91] *Id.* at 1016. *See supra* note 82 (circumstances in which petition will be allowed).

[92] *Olson*, 484 So. 2d at 1017.

[93] *Id.* The common law rationale was that the best interest of the child would be best served by avoiding any conflict between the authority of the parents and that of the grandparents. *Id.*

The first reported Mississippi case dealing with grandparent visitation was Gray v. Gray, 121 Miss. 541, 83 So. 726 (1920). In *Gray*, the parents filed a habeas corpus petition alleging that their child was being unlawfully detained by his paternal grandfather.

rights given by section 93-16-3,[94] but further acknowledged the statutory limitation placed on those rights by section 93-16-7 of the Mississippi Code.[95] Because section 93-16-7 expressly excluded visitation rights to natural grandparents of an adopted child,[96] the court concluded that the Mississippi legislation established legal rights of visitation only so long as the child remained unadopted.[97] The court, however, held that because her petition had not been acted upon prior to the adoption, the statute was applicable.[98] The court thus affirmed the dismissal of Mrs. Olson's petition.[99]

The reaction to the *Olson* decision[100] created activity on the legis-

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Gray, 121 Miss. at 541, 83 So. at 726. The trial court granted custody to the parents, but granted the grandfather visitation. *Id.* The Mississippi Supreme Court reversed the visitation stating that the habeas court had no authority to direct the manner in which a party should exercise his legal authority over a child. *Id.* at 545, 83 So. at 726; *see* Spain v. Holland, 483 So. 2d 318 (Miss. 1986)(custodial mother filed habeas petition against paternal grandparents alleging wrongful detention of minor child).

The next case in Mississippi which addressed grandparents visitation was Naveda v. Ahumada, 381 So. 2d 147 (Miss. 1980). The maternal grandparents petitioned to adopt their minor granddaughter, but the chancellor awarded custody to the natural mother. *Id.* The chancellor awarded the grandparents visitation rights. *Id.* Again the Mississippi Supreme Court reversed the visitation portion, stating that grandparents have no common law right absent parental consent. *Id.* at 148. The court further stated that "any obligation of a custodial parent to permit visitation of a grandchild by the grandparent is a moral obligation and not a legal right." *Id.* at 149 (quoting 67A C.J.S. *Parent and Child* § 41(c) (1978)).

See also, Naveda v. Ahumada, 381 So. 2d 147 (Miss. 1980)(where parent has custody, courts will not undertake to give visitation to grandparent over parent's objection)(quoting 59 AM. JUR. 2D *Parent and Child* § 45 (1971)).

[94] *Olson*, 484 So. 2d at 1017. *See supra* note 82 and accompanying text.

[95] *Olson*, 484 So. 2d at 1017. MISS. CODE ANN. § 93-16-7 reads in part: "This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted by order or decree of any court . . . ."

[96] *Olson*, 484 So. 2d at 1017.

[97] *Id.* Noting the harsh results of the holding, the court encouraged visitation on a voluntary basis. *Id.* The court stated that a less harsh and more restricted interpretation might be to hold that the statute only applied to full adoptions (where neither adopting parent is natural parent), but that to do so would be to judicially rewrite that which had been legislatively written. *Id.* Noting that the same code section granted legal visitation rights to adoptive grandparents, the court stated that it would not interpret the section to allow both natural and adoptive grandparents to petition for visitation because to do so would not be in the child's best interest. *Id.*

[98] *Id.* at 1018. The court strictly construed the statutory language of "has been adopted" to mean adopted at any time prior to establishment by a court order of legal right to visitation in the grandparent. *Id.*

[99] *Id.*

[100] The writer wishes to acknowledge John Robert White, J.D., University of Mississippi, 1985, for his insight, comments, and contribution to this portion of the Miscellane-

lative floors, which quickly accelerated when grandparents[101] read in the headlines that they were losing their rights of visitation to their grandchildren. Shortly thereafter, section 93-16-3 was amended[102] by the addition of language allowing a petition for visitation in a third situation.[103] More importantly, section 93-16-7 now allowed grandparents to petition subsequent to a half-adoption.[104] Although the timely amendment of the statutory scheme was laudable as an attempt to correct the harsh outcome of the *Olson* decision,[105] the amendment language is not without its own future problems.[106] Still, any legislative attempt to facilitate the objective determination of the paramount issue of the child's best interest is to be congratulated.[107]

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ous Section. Mr. White's contribution could not go without comment as it was instrumental to this review.

[101] The reader will note that parents were also fearful. Death of one parent, whether married or divorced at the time of death, coupled with a subsequent adoption of the children by a step-parent would terminate grandparents' visitation rights as to the ascendents of the dead parent.

[102] H.B. No. 292, Reg. Sess., Miss. Leg., 1986.

[103] *Id.* The amendment allowed grandparents to petition any time a court order was entered awarding custody of a child to one of the parents. *Id.* The amendment, however, only allowed the grandparents of the non-custodial parent this right. *Id.* The presumption that the custodial parent will allow his own parents visitation is valid in a majority of cases, but it is not absolute. Thus, should there exist an inter-family conflict on the custodial parent's side, this set of grandparents is without legal recourse. "There is no logic in bestowing statutory visitation rights on one set of grandparents while wagering the visitation privileges of the other set of grandparents on the fickled nature of human folly." John Robert White (unpublished manuscript).

[104] H.B. No. 292, Reg. Sess., Miss. Leg., 1986. The amended statute expressly allowed grandparents to petition subsequent to an adoption when "one (1) of the legal parents of such child is also a natural parent of such child," i.e., a half-adoption. *Id.*

[105] However, the legislative action was not retroactive, which effectively did nothing to alleviate Mrs. Olson's problem.

[106] The future interpretation given to the amended language "natural parent" may be dispositive. Taking the *Olson* facts and applying them to a family situation in which there were "natural" children, and "adopted" children, if the statute is construed strictly as done in *Olson*, grandparents could conceivably have differing rights to individual children. The rights gained would depend on whether the grandchild was "natural" or "adoptive." The legislature could have avoided this possible situation by adopting the following language: This chapter shall not apply to the granting of visitation rights to the grandparents of any child who has been adopted by order or decree of any court by *any person other than a step-parent*. MASS. GEN. LAWS ANN. ch. 119, § 39D (West Supp. 1986). This suggested language would also cure a potential problem where a couple adopted a child.

This review again credits and acknowledges the contribution of John Robert White to the analysis stated within this note.

[107] Although there are exceptions to every rule, the statement made in Mimkon v. Ford, 332 A.2d 199, 204 (N.J. 1975), seems to be the most appropriate conclusion for this

D. Property Accumulated Through Joint Efforts of Unmarried Man and Woman "Partnership" Will be Equitably Distributed

In the case of *Pickens v. Pickens*,[108] the Mississippi Supreme Court addressed the equitable distribution of accumulated assets between an unmarried couple upon the permanent separation of the couple.[109] In *Pickens*, after 14 years of marriage and five children,[110] Norma Jean and Robert Pickens divorced.[111] However, within one year, the two began living together, had two more children, but never remarried.[112] Soon after Robert's retirement, twenty year later, the couple separated.[113] A few months later, Norma Jean Pickens filed suit requesting an equitable distribution of the property accumulated during the time they lived together.[114] The chancellor held that the assets were divisible.[115]

Although the court acknowledged that the legal relationship of husband and wife could be created in Mississippi only by compliance with the state's statutory scheme,[116] the court concluded that state law

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review: "It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms."

[108] 490 So. 2d 872 (1986).

[109] *Id.* at 873.

[110] *Id.* Norma Jean and Robert Pickens were married on January 9, 1948. *Id.*

[111] *Id.* The Chancery Court of Monroe County, Mississippi, entered the divorce decree on September 25, 1962. *Id.*

[112] *Id.*

[113] The couple separated in August of 1983. *Id.*

[114] *Id.* Norma Jean Pickens filed suit in the Chancery Court of Lee County, Mississippi, on October 17, 1983. *Id.*

[115] *Id.* On May 17, 1984, the chancellor entered final judgment. *Id.* The trial court found that with two exceptions both parties had held themselves out as husband and wife, and had contributed equally to the accumulation of the property. *Id.* The first was a parcel of land that Robert Pickens had inherited from his parents, and which he had sold for $7,500. *Id.* at 874. The second was a personal injury settlement which Robert Pickens had received in the amount of $3,200. *Id.*

The chancellor also held that one-half of the $19,000 in certificates of deposits (most in the sole name of Robert) had accrued solely from Robert's efforts; thus one-half was set aside for Robert alone with the remaining half to be equally divided between the two parties. *Id.* Although the homestead was solely in Robert's name, the court only allowed him to maintain equity in the amount of $8,000 (by virtue of his inheritance) with the remaining equity of $12,000 to be divided equally. *Id.* Norma Jean was given title to the 1978 Ford LTD; the household furnishings and personal property were divided equally. *Id.*

[116] *Id.* at 875. *See* MISS. CODE ANN. §§ 93-1-1 et seq. (1972 and Supp. 1985)(Mississippi's statutory marriage requirements). The only exception to this rule is where cohabitation ripened into a common law marriage prior to April 5, 1956. MISS. CODE ANN. § 93-

authorized and sanctioned an equitable division of property accumulated by two persons as a result of their joint efforts.[117] The fact that those persons were common-law business partners or man and woman living in a non-marital cohabitation was irrelevant.[118] The court stated that the authorization of any award to the woman of a share of the property accumulated was proper and may be in kind or by a fixed sum paid over a period of time.[119] The court held further that in the determination of an equitable division, the chancellor was not limited to the earning capacity and cash contributions made by each party.[120] Finally, the court noted that Robert Pickens seemed to have been given the benefit of the doubt in the division of property; accordingly, the decision was affirmed.[121]

The future impact of this decision may be far-reaching to those persons who choose to forego marriage, or those who live together prior to marriage. The criteria set forth were that the parties be accepted as a "partnership," that through their joint efforts property be accumulated, and that the parties be permanently separated.[122] When these

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1-15 (1972). Thus, a woman may not inherit from a man with whom she has lived, *In re* Estate of Alexander, 445 So. 2d 836 (Miss. 1984), nor receive workers' compensation benefits as a dependent widow, Dale Polk Constr. Co. v. White, 287 So. 2d 278 (Miss. 1973).

[117] *Pickens*, 490 So. 2d at 875. In Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951), two persons lived together for ten years, only to discover that they were not legally married because the man's prior marriage had never been lawfully terminated. The *Chrismond* court ordered an equitable distribution of the property accumulated during their cohabitation. *Chrismond*, 211 Miss. at 758-59, 52 So. 2d at 629. The distribution was based on the factual finding by the court that the woman had taken care of the house, cared for the man, and worked with him in his business. *Id. See also* Taylor v. Taylor, 317 So. 2d 422, 423 (Miss. 1975)(where parties lived together for 18 years without legal marriage, alimony not allowed, but division of property allowed).

[118] *Pickens*, 490 So. 2d at 875. *See supra* note 117 and accompanying text.

[119] *Pickens*, 490 So. 2d at 875. *See* Taylor v. Taylor, 317 So. 2d 422, 423 (Miss. 1975)(man ordered to pay $75 per month for 36 months as equitable division of property).

[120] *Pickens*, 490 So. 2d at 876. The court cited Tedford v. Dempsey, 437 So. 2d 410, 422 (Miss. 1983), for the proposition that where one party to the relationship acts without compensation to perform work or render services to a business enterprise or performs work or services generally regarded as domestic in nature, these services are economic contributions. *Pickens*, 490 So. 2d at 876. Furthermore, these services are to be valued by reference to the cost of similar services in the marketplace. *Id.*

[121] *Pickens*, 490 So. 2d at 876. The court noted that the share given Robert Pickens more than fairly compensated him for the inheritance and personal injury monies. *Id.*

[122] *Id.* In a footnote, the court noted that when a valid marriage is dissolved, the parties may be entitled to an equitable division of properties accumulated. *Id.* at 876 n.1. In this context, the division is based on economic contributions made by each. *Id. See* Maxcy v. Estate of Maxcy, 485 So. 2d 1077, 1077 (Miss. 1986)(decree calling for sum to

criteria are met, an equitable division of such property will be ordered.[123] The court seems to have set an objective standard to be used in determining any subsequent property division between those couples who choose long-term, non-marital relationships.

II. Wills and Estates

A. *Mortmain Laws Apply to Trusts Only When Proscribed Institution Holds an Identifiable Present or Future Interest in Land for Ten Years*

In *Johnson v. Board of Trustees*,[124] the court addressed the constitutional[125] and statutory[126] mortmain provisions of Mississippi law.

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be paid in four installments is lump-sum alimony, when also termed as "one-half of the assets accumulated during the marriage of the parties"). The *Pickens* court stated that even though it had recognized other rights arising from a valid marriage, that fact did not preclude it from recognizing an equitable division of property in a non-marital cohabitation. *Pickens*, 490 So. 2d 876 n.1.

[123] *Pickens*, 490 So. 2d at 876.

[124] 492 So. 2d 269 (Miss. 1986).

[125] *Id.* at 271. Section 270 of the Mississippi Constitution provides:

> Section 270. No person leaving a spouse or child, or descendants of child shall, by will, bequeath or devise more than one-third of this estate to any charitable, religious, educational or civil institutions, to the exclusion of such spouse or child, or descendants of child, and in all cases the will containing such bequest or devise must be executed at least ninety days before the death of the testator, or such bequest or devise shall be void.
>
> Provided, however, that any land devised, not in violation of this section, to any charitable, religious, educational, or civil institution may be legally owned, and further may be held by the devisee for a period of not longer than ten years after such devise becomes effective, during which time such land and improvements thereon shall be taxed as any other land held by any other person, unless exempted by some specific statute.

Johnson, 492 So. 2d at 271.

[126] *Johnson*, 492 So. 2d at 271. Mississippi's constitutional mortmain provision is codified almost verbatim in Miss. Code Ann. § 91-5-31 (1972), with this addition:

> Provided further, that within said period of ten years during which such land may be held, the charitable, religious, educational, or civil institution holding the same shall have the power and right to sell and convey the said lands so held, or any part thereof; and its deed of conveyance may be treated as passing such title thereto as was possessed by the testator, or the said land, or any part thereof, may be leased for a length of time not extending beyond the expiration of the period during which it may be legally held by the lessor institution. If such land be not sold and disposed of within the said period of ten years, then in that event, at the expiration of the said period of ten years, it shall revert to the heirs at law of the testator under whose will it was devised to the institution holding it, or to the devisees under such will, as the case may be.

Mrs. Georgia Hodges devised real property in Jackson to appellee's predecessor as trustee "for the benefit of needy colored children," with a stipulation that the property not be sold for ten years without court order.[127] Prior to her death, Mrs. Hodges entered into a long-term ground lease, which was later sublet to Willard Johnson, appellant.[128] After initial negotiations with appellee seemed to indicate that title to the property was questionable,[129] Johnson obtained quitclaim deeds from the three sole heirs[130] and filed suit to remove cloud from the title.[131] The trial court denied all relief requested,[132] stating that under *Crook v. Commercial National Bank and Trust Co.*,[133] this trust was

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Johnson, 492 So. 2d at 271.

[127] *Johnson*, 492 So. 2d at 269-70. The will further provided that all income from the property be used as a scholarship fund. *Id.* If a court order was obtained, the land could be sold, with all proceeds therefrom to be used as an "education fund for colored children." *Id.*

[128] *Id.* at 270. The original lease was for a primary term of five years, with an option to renew for four successive five-year terms. *Id.* The lessee was Joe Dehmer Distributor, Inc. *Id.* Johnson sublet from Dehmer on March 5, 1966. *Id.*

[129] *Id.* Approximately two years after Mrs. Hodge's death, Johnson began negotiations with the church to purchase clear title to the property in return for $26,000. *Id.* During this period, the title company expressed concern over the alienability of the property due to the possible application of the mortmain statute. *Id.*

[130] *Id.* In September, 1980, rather than closing the sale with the church, Johnson obtained quitclaim deeds from the three sole heirs, all cousins of Mrs. Hodges, for the sum total of $14,000. *Id.*

[131] *Id.* Johnson claimed that the mortmain statute applied to the trust and that the appellee's retention of title for over ten years caused title to revert automatically to the heirs. *Id.* He further argued that the quitclaim deed vested full legal title to the property in him. *Id.* Therefore, Johnson requested that title be vested in him and an accounting of all monies received under the Dehmer lease after February 12, 1977 to be delivered to him. *Id.*

[132] *Id.* at 270-71. The court found that the trust was not one which was prohibited by the mortmain statute, because the appellee did not share in the income or benefit therefrom since the income was used as an educational/scholarship fund. *Id.* at 271.

[133] 375 So. 2d 1006 (Miss. 1979). In *Crook* the supreme court upheld a trust, the beneficiary of which was the testator's brother for the duration of the brother's life. *Id.* at 1007. Upon the brother's death, the East Mississippi Insane Asylum became the beneficiary. *Id.* The trust was administered by a bank. *Id.* The *Crook* court held that the mortmain statute was not applicable and set forth a four-part test to determine when real property may be left in a charitable testamentary trust without being subjected to the mortmain requirements:

> (1) there are no restrictions placed on the trustee with reference to the alienation of such property, and
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> (2) such property shall not pass to a proscribed institution after the expiration of the trust or prior thereto except by a direct armslength sale, and
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> (3) the trustee shall be charged with the duty, as provided by law, that he deal with and manage the property as any prudent trustee would, including

not prohibited by the mortmain provisions. Johnson appealed.

The Mississippi Supreme Court agreed with Johnson's primary argument that the lower court misinterpreted *Crook*.[134] Relying upon two prior cases for precedent, the court held that the mortmain provisions did apply to the trust herein.[135] In *Mississippi College v. May*,[136] the testator devised a farm to the college requiring the farm to be sold and the proceeds used to set up a trust fund for Christian education at the college.[137] The *May* court held that the land automatically reverted to May's heirs through the mortmain provisions because the college had retained the property for ten years.[138] The second case relied upon by the court was *Methodist Hospital v. Slack*.[139] The testator therein devised her interest in a plantation to a bank as trustee for fifteen years.[140] The revenue generated from the land was to become part of the estate, all of which was to pass to the Methodist Hospital of Mem-

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selling or disposing thereof as prudence would dictate, and

(4) the trustee or trustees are not the same owners, management or trustees of a proscribed institution which is designated to share in the income or benefits of the trust.

Id. at 1011-12. The *Johnson* trial court applied this test and determined that Mrs. Hodge's testamentary trust met the requirements set forth. *Johnson*, 492 So. 2d at 271. Thus, the trust was free of the ten-year retention requirements. *Id.*

[134] *Johnson*, 492 So. 2d at 271.

[135] *Id.*

[136] 235 Miss. 200, 108 So. 2d 703 (1959).

[137] *Id.* at 209-10, 108 So. 2d at 705-06. Dr. May had no spouse, children or grandchildren surviving him. *Id.* The will provided that at the proper time the farm was to be sold. *Id.* At the end of the ten-year period, Jay's heirs filed suit basing their claim on the mortmain statute. *Id.*

[138] *Id.* at 214-15, 108 So. 2d at 708. The *May* court stated that the mortmain provisions of the Mississippi Constitution and the Mississippi Code, when read together, set up in the institutional devises an estate for ten years, with a power of disposition. *Id.* The heirs of the testator had a vested remainder, subject to defeasance. *Id.* at 219-20, 108 So. 2d at 711. The court specifically addressed the argument that section 270 was not applicable because the devise to the college was in trust for the benefit of students. *Id.* at 218, 108 So. 2d at 710. The court opined that where the proceeds are to be used for some of the purposes for which the institution was created, the devise falls within the prohibition of section 270. *Id.*

The *Johnson* court noted that it is *not* the law of Mississippi that a devise of land in trust to a proscribed institution, where the proceeds are not to be used for some of the purposes for which the institution was created, is outside the application of the mortmain laws. *Johnson*, 492 So. 2d at 272. (This assumption was erroneously made by the trial court).

[139] 330 So. 2d 882 (Miss. 1976).

[140] *Id.* at 886. Mamie Thomas devised an undivided interest in a plantation to Union Planter's National Bank. *Id.* at 886-87. The will provided that the trust was to exist for 15 years. *Id.*

phis, subject to the hospital's acceptance within ten years of the testator's death.[141] The court held that the mortmain provisions applied.[142] The court further stated that the trust, if allowed, would thwart the fundamental purpose[143] of the constitutional and statutory mortmain provisions.

In explanation of why the lower court erred in applying the *Crook* test, to the trust *sub judice*, the *Johnson* court stated that the *Crook* trust was outside the mortmain requirements.[144] Such holding was based upon the fact that the proscribed institution had only a right to receive the income derived from the corpus of the trust.[145] The institution had no present or future interest in the land.[146] Thus the *Crook* test is not applicable if a clearly identifiable interest in land exists in the proscribed institution.[147] The court noted further that the *Crook* test should be used only to determine whether the mortmain laws apply to a trust where there is a question of whether the institution holds an income right[148] or a property right.[149] Thus, the court found that

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[141] *Id.* at 886-88. The hospital accepted the offer in 1963. *Id.* After the 15-year period expired, the bank conveyed title to the hospital. *Id.*

[142] *Id.* at 890. The court noted that the mortmain statutes applied because upon the hospital's timely acceptance, the hospital became vested with a remainder interest in the plantation. *Id.*

[143] *Id.* at 889. The fundamental purpose of the mortmain provisions, both constitutional and statutory, were to prevent the undue accumulation of land in certain classes of institutions. *Id.* Mortmain is defined as a "term applied to denote the alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal." BLACK'S LAW DICTIONARY 913 (5th ed. 1979).

[144] *Johnson*, 492 So. 2d at 274. Justice Sullivan stated that the court was not doing away with the *Crook* four-part test; it was simply giving an explanation of when its applicability was required. *Id. See also supra* note 133 and accompanying text.

[145] *Johnson*, 492 So. 2d at 274. *See* Calhoun v. Markow, 168 Miss. 556, 566, 151 So. 547, 549 (1933)(trust set up to produce income for benefit of children with trustee having full power of corpus; trust not available to childrens' creditors); Mitchell v. Choctaw Bank, 107 Miss. 314, 314, 65 So. 278, 279 (1914)(where trustee had unqualified authority of management, use, possession and disposition, children have only beneficial interest, thus creditor cannot reach trust for childrens' debt); *see also* 90 C.J.S. *Trusts* § 186 (1955)(if beneficial interest with no right, title or interest in property, only right to income is personal property).

[146] *Johnson*, 492 So. 2d at 274-75. *See supra* notes 138 and 142 and accompanying text.

[147] *Johnson*, 492 So. 2d at 275.

[148] *Id.* The *Johnson* court noted that often the line between when a beneficiary has only an income right and when he has a property interest may be difficult to determine. *Id.* In dicta, the court stated that if it appears that a proscribed institution has only a beneficial income interest in the corpus, but the trust does not meet all the prongs of the *Crook* test, the mortmain laws apply to the trust. *Id.*

[149] *Id.* If, however, the proscribed institution is devised the land in trust, it takes

since the proscribed institution had an identifiable property interest which it held for the ten-year period, the mortmain reverter provision applied.[150]

Noel Victoria Holladay

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legal title as trustee with equitable title left to the beneficiaries. *Id.* The legal estate in a trustee is a possessory one attendant with all the rights and duties of an absolute owner. *Id. See also* 90 C.J.S. *Trusts* § 180 (1955)(cited by court for this proposition).

[150] *Johnson*, 492 So. 2d at 275. The court held that appellee's predecessor took legal title in trust for ten years with a power of disposition which it did not use. *Id.* Therefore, MISS. CODE ANN. § 91-5-31 (1972) came into operation, whereby the land reverted to the testator's heirs at law or to the devisees under the will. *Johnson*, 492 So. 2d at 275. Because the will's residuary devisee was also a proscribed institution, Johnson obtained full legal title through his quitclaim deed from the heirs at law. *Id.* The court further held that Johnson was entitled to the rents collected from and after the tenth anniversary of the testator's death, because the right to receive all rents reverted when the land reverted to the heirs and thus to Johnson. *Id.* at 276.

PROPERTY

In 1986 the Mississippi Supreme Court rendered thirty-one decisions concerning property law. Most of the decisions represent neither a significant departure from nor advancement of existing law in Mississippi and will be noted topically in the footnotes. These decisions were made in the areas of adverse possession,[1] cancelling clouds,[2] constructive trust,[3] eminent domain,[4] homesteads,[5] mortgages,[6] municipal in-

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[1] Eason v. Hudson, 498 So. 2d 836, 836 (Miss. 1986)(affirmed chancellor's decree of adverse possession); Savage v. Parrish, 488 So. 2d 1342, 1342 (Miss. 1986)(Chancellor's rejection of adverse possession claim will not be disturbed absent manifest error); Monaghan v. Wagner, 487 So. 2d 815, 819 (Miss. 1986)(to effect ouster of remaindermen not in possession, unequivocal notice of exclusive claim of ownership, such as filing of record deed of trust or oil and gas lease, must be imparted); Shows v. Watkins, 485 So. 2d 288, 290 (Miss. 1986)(all elements of adverse possession met).

[2] Hans v. Hans, 482 So. 2d 1117, 1120 (Miss. 1986)(for purpose of statute of limitations, action to cancel cloud accrued when correction deed was executed, not when alleged acts of dominion occurred since use was permissive).

[3] Neyland v. Neyland, 482 So. 2d 228, 230 (Miss. 1986)(where one party would be unjustly enriched by retaining property interest acquired at expense of another, constructive trust and equitable lien arise).

[4] Tennessee Gas Pipeline Co. v. Amos, 497 So. 2d 438, 440 (Miss. 1986)(amounts paid for easements in settlement of prior condemnation proceedings or paid in anticipation of prior condemnation proceedings are inadmissible to determine fair market value of property taken for later easement); Mississippi State Highway Comm'n v. Franklin County Timber Co., Inc., 488 So. 2d 782, 785-87 (Miss. 1986)(due compensation for taking includes value of property and damage, if any, to remainder; value of long term lease may be considered as comparable sale; jury's determination of damages will be affirmed unless unsupported by evidence); Ellis v. Mississippi State Highway Comm'n, 487 So. 2d 1339, 1341 (Miss. 1986)(where land subject to mortgage is condemned, bank officer's opinion of value is inadmissible absent personal appraisal or personal knowledge of loan).

[5] Shows v. Watkins, 485 So. 2d 288, 291-92 (Miss. 1986)(homestead can be determined by homestead declaration, intent to use property as homestead, or purpose and use to which property is put; homestead rights exist in property acquired by adverse possession; depending on circumstances, property under commercial lease may qualify as homestead).

[6] Crystal v. Duffy, 493 So. 2d 942, 945 (Miss. 1986)(where purchasers of mortgaged property assume liability for primary and secondary mortgages and purchase property at foreclosure sale on first mortgage, they remain personally liable to holder of secondary mortgage); Leininger v. Merchants & Farmers Bank, 481 So. 2d 1086, 1090 (Miss. 1986)(adoption of majority view that power of sale foreclosures authorized by deeds of trust constitute private action and are not within purview of due process clause of federal constitution).

corporation,[7] oil and gas,[8] options,[9] partition,[10] public nuisance,[11] public use land,[12] public work,[13] rescission,[14] tax sales,[15] trespass,[16] undue influence,[17] and zoning.[18] Four decisions, however, represent important

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[7] City of Pascagoula v. Scheffler, 487 So. 2d 196, 198, 201-02 (Miss. 1986)(adjacent municipality may object to any aspect of petition for incorporation; adoption of factors to determine compliance with statutory requirement that incorporation be reasonable and required by public convenience and necessity).

[8] Neil v. Jones, 497 So. 2d 797, 799-800 (Miss. 1986)(holding that instruments were mineral deeds not leases; instruments not void for vague description; and reformation was proper remedy); Wise v. Scott, 495 So. 2d 16, 19-21 (Miss. 1986)(applying estoppel by warranty, court held that grantor's warranty was superior to his reservation in several property deeds; to reform deed, mutual mistake must be proved beyond reasonable doubt; proof insufficient to establish malicious intent for slander of title); Elf Acquitaine, Inc. v. Amoco Prod. Co., 485 So. 2d 1023, 1026 (Miss. 1986)(construing definition in lease, court held that tracts of land touching corners are contiguous); Southern Oil & Gas, Inc. v. Hall, 485 So. 2d 1066, 1067-68 (Miss. 1986)(affirmed chancellor's remedy of rescission of mineral lease and repayment of bonus for mutual mistake).

[9] Moore & McCaleb, Inc. v. Gaines, 489 So. 2d 491, 493 (Miss. 1986)(where lease with option to purchase given as security for loan, option, absent express reservation in security agreement, granted to secured party).

[10] Trigg v. Trigg, 498 So. 2d 334, 334 (Miss. 1986)(joint tenant may maintain partition action against estranged co-tenant spouse; claim of homestead exemption no defense); Monaghan v. Wagner, 487 So. 2d 815, 820 (Miss. 1986)(partition by sale unavailable if partition in kind is feasible).

[11] Proby v. State, 498 So. 2d 792, 794-95 (Miss. 1986)(nuisance statutes have not displaced common law rules of nuisance; in abatement action charter of establishment primary focus and specific instances of conduct admissible when action based on common law).

[12] Modling v. Bailey Homes and Ins., 490 So. 2d 887, 890 (Miss. 1986)(since property was not dedicated to public use but was reserved, city could sell it).

[13] Mississippi State Highway Comm'n v. Wood, 487 So. 2d 798, 802 (Miss. 1986)(where necessary for maintenance of highways, highway department may perform public work on private land).

[14] Gray v. Baker, 485 So. 2d 306, 308 (Miss. 1986)(where vendor would not have conveyed property had he known preexisting plan by vendee to sell property to someone vendor found objectionable, conveyance may be rescinded by vendor).

[15] DeWeese Nelson Realty, Inc. v. Equity Serv. Co., 502 So. 2d 310, 314 (Miss. 1986)(where clerk followed procedures for ascertaining mailing address and received no indication notice had not been imparted, clerk's duty to conduct diligent search and inquiry fulfilled; court advised legislature to reconsider statutory procedure for notice of tax sales in light of Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)).

[16] Eason v. Hudson, 498 So. 2d 836, 836 (Miss. 1986)(reversed amount awarded under MISS. CODE ANN. § 95-5-3 (1972) for destruction of trees and rendered statutory penalty in accordance with amendment to § 95-5-3).

[17] Norris v. Norris, 498 So. 2d 809, 814 (Miss. 1986)(confidential relationship existed between infirm grantor and former spouse which created presumption of undue influence; grantee did not rebut presumption by clear and convincing evidence).

[18] Broadacres, Inc. v. City of Hattiesburg, 489 So. 2d 501, 505 (Miss. 1986)(council's

developments in Mississippi property law and will be discussed in detail.

I. Geographical Boundary of Public Trust Lands

One of the more important and complicated decisions rendered in 1986 was *Cinque Bambini v. State of Mississippi*,[19] which determined title to 2400 acres of tideland property in Hancock County. Cinque Bambini and other appellants (hereinafter Cinque Bambini), held record title to the land which was originally conveyed by Spanish land grant in 1813.[20] The State of Mississippi, however, claimed the land as part of the federally created public trust and asserted that it held title in its capacity as trustee.[21] The dispute arose in 1977 when the Mississippi Mineral Lease Commission, relying on wetland maps prepared by the Mississippi Marine Resources Council, leased 600 acres of land owned by Cinque Bambini to Saga Petroleum U.S., Inc.[22] Cinque Bam-

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decision to rezone will not be disturbed absent clear evidence that decision was clearly "unreasonable, arbitrary, capricious or discriminatory"); City of Jackson v. Aldridge, 487 So. 2d 1345, 1348 (Miss. 1986)(reinstated decision of Jackson City Council due to absence of "clear and uncontradicted evidence" of both change in character of area and of public need for rezoning).

[19] 491 So. 2d 508 (Miss. 1986).

[20] *Id.* at 510.

[21] *Id.* The public trust doctrine had its origin in the eighteenth century and was used by the federal government to preserve tidelands and navigable rivers for public use and enjoyment. *Id.* at 511. Before statehood, title to all land in the Mississippi Territory (except that privately owned when the United States acquired it) was held by the federal government in trust. *Id.* at 511, 518. When Mississippi became a state in 1817, the federal government created two public trusts and conveyed fee simple title to land therein to the state to be held for public use. *Id.* at 511. One trust contained sixteenth section land for public schools, and the other, which is the focus of this case, contained tidelands, navigable waters and the lands beneath them. *Id.*; *see* Turney v. Marion County Bd. of Educ., 481 So. 2d 770, 776-77, 783-84 (Miss. 1985)(discussing history of school trust lands); State *ex rel.* Rice v. Stewart, 184 Miss. 202, 234, 184 So. 44, 51 (1938)(discussing history of tidelands trust and school trust lands). While fee simple title to land was conveyed to the State upon admission to the Union, title was subject to the purpose of the trust. *Cinque Bambini*, 491 So. 2d at 512. *See generally* A. Porro & S. Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323 (1972)(discussing history of public trust doctrine); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970)(discussing historical development of public trust doctrine); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970)(discussing case law development of public trust rules).

[22] *Cinque Bambini*, 491 So. 2d at 511. Pursuant to § 49-27-65 of the Coastal Wetlands Protection Law (Miss. Code Ann. §§ 49-27-1 to -69 (Supp. 1986)), the Mississippi Marine Resources Council prepared maps of wetland areas for jurisdictional purposes

bini subsequently filed suit to confirm title and remove clouds, and the State counterclaimed.[23]

The Chancery Court of Hancock County held that the State owned 140.863 of the 240 acres, including land which artificially came under tidal influence as a result of dredging fill material for construction of Interstate 10.[24]

On appeal, the Mississippi Supreme Court affirmed in part, reversed and rendered in part and remanded the case for further action.[25] Noting that the primary question on appeal was the inland boundary of lands currently held in public trust by the State, the court stated that resolution of this question depended first on a determination of what land was granted by the federal government in 1817 when Mississippi became a state.[26] More specifically, did the federal grant of 1817 include non-navigable tidally influenced waters?[27] Since public trust lands were given to the State by the federal government, the court reasoned that the extent of the original grant was a question of federal law.[28] As a general rule of federal law, the court noted that trust lands originally included lands within the ebb and flow of the tide.[29] Ebb and flow of the tide, however, has historically been inter-

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and filed them in chancery clerks' offices in three counties. *Cinque Bambini*, 491 So. 2d at 511. Contrary to explicit instructions from the Mississippi Marine Resources Council that the maps were inaccurate and were to be used only for determining its jurisdiction over coastal areas, the Mississippi Mineral Lease Commission used the maps to identify and lease state lands for oil and gas exploration. *Id.*

[23] *Cinque Bambini*, 491 So. 2d at 511. The State counterclaimed for the value of dirt which it alleged was removed from public trust land in connection with construction of Interstate 10. *Id.* at 521.

[24] *Id.* at 510.

[25] *Id.* at 522.

[26] *Id.* at 513. The difference between the current inland boundary of public trust lands and that in 1817 is attributable to the processes of accretion, reliction and avulsion. *See infra* notes 44-52 and accompanying text.

[27] *Cinque Bambini*, 491 So. 2d at 514.

[28] *Id.* at 513. The court reasoned that since title to all land was vested in the federal government prior to statehood and since the federal government conveyed certain land for the public trust to the State of Mississippi in 1817 and reserved the remaining land to be patented to citizens, then determination of the geographical boundary of public trust lands is a federal question. *Id.*; *see* California *ex rel.* State Lands Comm. v. United States, 457 U.S. 273, 286 n.14 (1982)(federal law governs extent of title initially conveyed under equal footing doctrine); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977)(federal law determines initial boundary of public trust lands); Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 22 (1935)(boundary of land conveyed by federal government governed by federal law; rights and interests in tidelands governed by state law).

[29] *Cinque Bambini*, 491 So. 2d at 513.

preted in two different ways. Citing *The Propeller Genessee Chief v. Fitzhugh*[30] and *Martin v. Waddell's Lessee*,[31] Cinque Bambini argued that ebb and flow of the tide historically meant navigable waters, and that the boundary of trust lands included only navigable waters subject to the ebb and flow of the tide in 1817.[32] The State, on the other hand, argued that the trust historically included both lands subject to the ebb and flow of the tide below the mean high water mark of 1817 (i.e., non-navigable tidally influenced waters) and also waters which were navigable in 1817.[33] Reconciling these two interpretations, the Mississippi Supreme Court noted that the navigable waters test was developed to expand the scope of trust lands, pursuant to the equal footing doctrine, to include all navigable freshwaters in inland states.[34] Adopting the State's position, the court held that the federal government granted to Mississippi in 1817 "all lands subject to the ebb and flow of the tide and up to the then mean high water level without regard to navigability" and the beds and waters of streams and rivers which were navigable in 1817.[35]

The second major issue raised on appeal was the validity of Cinque Bambini's title. Cinque Bambini argued that since its title was derived from Spanish land grants dating from 1813 (four years before statehood), the United States never had title to the land in question

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[30] 53 U.S. (12 How.) 443 (1851).

[31] 41 U.S. (16 Pet.) 367 (1842).

[32] *Cinque Bambini*, 491 So. 2d at 513.

[33] *Id.* at 514.

[34] *Id.* Explaining the equal footing doctrine, the court stated that when the federal constitution was ratified "the original thirteen states withheld their tidelands and navigable waters from the United States." *Id.* at 512. In order to admit new states on an equal footing with the original thirteen, the federal government created public trusts of tidelands and navigable waters and conveyed fee simple title to each state. *Id.*

[35] *Id.* at 514, 516. Although the court held that navigable freshwaters are held by the states in trust, the court noted that "before anyone perceived that the trust extended to navigable freshwaters, Mississippi had already adopted the common law rule that riparian owners hold the beds of such waters to the center of the stream." *Id.* at 517. Included in the original grant were all areas below the mean high watermark, regardless of navigability, and watercourses which were navigable in 1817 and the land beneath them. *Id.* at 514. In reaching this holding, the court noted that there was no federal case expressly addressing the question of whether non-navigable tidally influenced waters were included in the 1817 grant. *Id.* Although the court held that the determination of the boundaries of the 1817 grant was a question of federal law, it noted that Mississippi public trust cases reached conclusions consistent with those reached by the court under federal analysis. *Id.* at 516; *see, e.g.*, State *ex rel.* Rice v. Stewart, 184 Miss. 202, 230-31, 184 So. 44, 50 (1938)(geographical boundary of trust lands includes lands over which tide ebbs and flows); Rouse v. Saucier's Heirs, 166 Miss. 704, 713, 146 So. 291, 291-92 (1933)(trust includes title to lands between high and low water marks).

and therefore could not have transferred it to the state in public trust.[36] Citing *Pollard's Lessee v. Hagan*[37] and *Henderson v. Poindexter's Lessee*,[38] the court first noted that the United States Supreme Court has refused to recognize the validity of land titles in Spanish West Florida derived from Spanish land grants made after 1783.[39] Second, the court noted three events in the early nineteenth century which affected Spanish land grants.[40] In 1810 President Madison claimed West Florida below the 31st parallel as part of the United States. In February of 1812 Congress gave Madison authority to take this land,[41] and in May of 1812 the land was annexed to the Mississippi Territory.[42] The court reasoned that since the Spanish grants of 1813 occurred after West Florida below the 31st parallel was claimed by the United States and after the land in this dispute was annexed to the Mississippi Territory, title never vested in Cinque Bambini.[43] The court further held that Acts of Congress in 1819, 1822 and 1830 validating the Spanish grants were ineffective because the federal government's title to the lands was conveyed in 1817 when Mississippi became a state.[44]

Having determined that the state holds title to all lands that were subject to tidal influence in 1817, whether or not navigable, and that Cinque Bambini's title to the land was invalid, the court addressed the third significant issue on appeal, which was whether the boundaries of the public trust are the same today as they were in 1817 or whether they are subject to accretion, reliction and avulsion.[45] Deciding that the legal effect of each was a question of state law, the court first addressed accretion.[46] Starting with the propositions that one holding

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[36] *Cinque Bambini*, 491 So. 2d at 518.

[37] 44 U.S. (3 How.) 212, 226 (1845).

[38] 25 U.S. (12 Wheat.) 530, 535-36 (1827).

[39] *Cinque Bambini*, 491 So. 2d at 518. Citing Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 205-09 (1984); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 375 (1977); and Knight v. United States Land Ass'n., 142 U.S. 161, 183 (1891), the court acknowledged that precedent existed for Cinque Bambini's position, but restricted those cases to ceded territory held by private citizens under Mexican land grants. *Cinque Bambini*, 491 So. 2d at 518.

[40] *Cinque Bambini*, 491 So. 2d at 518.

[41] *Id.*

[42] *Id.*

[43] *Id. See generally* ABERNATHY, THE SOUTH IN THE NEW NATION 358 (1961)(giving historical background of West Florida annexation)(cited at 491 So. 2d 519); A HISTORY OF MISSISSIPPI 226 (McLemore, ed. 1973)(same).

[44] *Cinque Bambini*, 491 So. 2d at 518.

[45] *Id.* at 519-20.

[46] *Id.* at 519; *see* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429

land adjacent to water is entitled to accretions and that the State holds title to lands not in existence at the time of the federal grant but created by accretions,[47] the court held that the 1817 boundaries of public trust lands may be increased by "the natural inland expansion of the tidal influence."[48] Regarding reliction, the court noted that under Mississippi case law land held in trust by the state can be alienated only pursuant to legislative approval.[49] However, the court refused to decide whether public trust lands may be lost through reliction.[50] Concerning avulsion, which was defined as "a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress,"[51] the court held that land which becomes subject to tidal influence by avulsion does not become part of the public trust.[52] The court thus reversed that part of the chancellor's decision giving the State title to lands brought under tidal influence through dredging by the State's general contractor in connection with construction of Interstate 10.[53]

Addressing the State's counterclaim for the value of dirt removed in connection with the construction of Interstate 10, which was presented as a cross-appeal, the court held that the State did not have title to land that became part of the public trust through avulsion and

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U.S. 363, 376 (1977)(effect of natural forces on boundaries of trust land is governed by state law). The court decided that the geographical boundaries of the original federal grant is a question of federal law. *See supra* note 28, and accompanying text.

[47] 491 So. 2d at 519; *see* H.K. Porter Co., Inc. v. Board of Supervisors, 324 So. 2d 746, 750-51 (Miss. 1975)(land owner is entitled to accretions; title to land not in existence at time of federal grant but created by accretions belongs to State).

[48] *Cinque Bambini*, 491 So. 2d at 519. This means that the current inland boundary of public trust land is to be determined by plotting the current mean high water mark. *Id.* at 519-21.

[49] *Id.* at 519; *see, e.g.*, State v. Hanson Properties, Inc., 371 So. 2d 871, 873 (Miss. 1979)(legislative authorization required); International Paper Co. v. Mississippi State Highway Dep't, 271 So. 2d 395, 398-99 (Miss. 1973)(same); Treuting v. Bridge and Park Comm'n, 199 So. 2d 627, 633-34 (Miss. 1967)(approving legislative authorization of sale of public trust land). The court also stated that alienation must be consistent with the purposes of the trust. *Cinque Bambini*, 491 So. 2d at 519.

[50] *Cinque Bambini*, 491 So. 2d at 519.

[51] *Id.* at 520.

[52] *Id.* This means that title remains in the owner of record. Elaborating, the court stated "[P]ut more broadly, under the laws of this state neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvements or alterations made thereto, become a part of the public trust, even though they may become tidally affected." *Id.*

[53] *Id.* The court reasoned that since the state did not purchase the land, claiming title would constitute a taking within the fifth and fourteenth amendments to the federal constitution and under article 3, section 17 of the Mississippi Constitution. *Id.*

therefore could not recover.[54] Concerning dirt removed from land within the public trust, the court affirmed the chancellor's ruling that the claim is impossible to prove.[55] Finally, the court remanded the case for determination of the exact boundaries of public trust land.[56]

The short and long term impact of *Cinque Bambini* is difficult to assess. Rather than giving stability to land titles and boundaries on the Gulf Coast, this case could cause a great deal of litigation over the location of the mean high water mark, which determines the boundary of public trust lands, as the State grants mineral leases or exercises other acts of dominion over lands subject to the ebb and flow of the tide and held under Spanish land grant by private citizens. However, the United States Supreme Court recently granted Cinque Bambini's petition for certiorari on the question of whether lands under non-navigable but tidally influenced waters were part of the public trust which was conveyed to the State of Mississippi upon its admission to the Union in 1817.[57]

II. Homeowners Associations

The Mississippi Supreme Court in 1986 rendered two decisions affecting the institution and operation of residential homeowners associations. In the first decision, *Perry v. Bridgetown Community Ass'n, Inc.*,[58] the court addressed the question of the extent to which amendments to restrictive covenants and corporate bylaws may increase a homeowners association's control over property in a subdivision.[59] In *Perry*, the original restrictive covenants were filed in the chancery clerk's office in DeSoto County in 1970, and a corporate charter was issued to Lakewood Estates Association in 1973.[60] Alex Perry and other appellants took title to their property subject to the restrictive covenants.[61] In 1975 the restrictive covenants were amended and the agreement containing the amendments was either signed by the appellants or the property was purchased by them from sellers, who had signed

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[54] *Cinque Bambini*, 491 So. 2d at 521.

[55] *Id.*

[56] *Id.* The court directed that this complex task be conducted in concert with attorneys and surveyors. *Id.*

[57] 491 So. 2d 508 (Miss. 1986), *cert. granted*, 55 U.S.L.W. 3569 (U.S. Feb. 12, 1987)(No. 86-870). The case has been restyled as Phillips Petroleum Co. v. Mississippi.

[58] 486 So. 2d 1230 (Miss. 1986).

[59] *Id.* at 1233-34.

[60] *Id.* at 1231.

[61] *Id.*

the agreement.[62] Following an amendment to the corporate charter of Lakewood Estates Association in 1979 in which the corporate name was changed to Bridgetown Community Association, new bylaws were adopted which modified and added to the original restrictive covenants.[63] The new bylaws and restrictive covenants enlarged the homeowners association's control over property in the subdivision, including one which required all property owners in the subdivision to pay maintenance assessments.[64] In 1980 plaintiff homeowners filed suit in the Chancery Court of DeSoto County against Bridgetown Community Association and its officers and directors, asking for a temporary injunction to freeze the corporation's assets and enjoin the officers and directors from enforcing the new bylaws.[65] The chancellor granted the temporary injunction but later dissolved it and dismissed the suit.[66]

The primary question on appeal was the extent to which a homeowners association's powers may be expanded by subsequent modification.[67] More specifically, the court divided this question into three sub-

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[62] *Id.* at 1232.

[63] *Id.*

[64] *Id.* The new bylaws included provisions requiring mandatory membership in the homeowners association; granting members easements to common areas; creating an architectural committee to oversee and review plans, construction and maintenance of homes (including approval of exterior house colors); adding new use restrictions; and permitting enforcement of covenants in law or equity. *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1233. Before resolving this question, the court discussed several general rules concerning the formation and operation of homeowners associations. *Id.* at 1232-33. First, the court noted that recorded restrictive covenants run with the land and, thus, are enforceable against original parties to the covenants and their successors in title. *Id.* at 1232-33; *see* William W. Bond, Jr. & Assoc., Inc. v. Lake O'The Hills Maintenance Ass'n., 381 So. 2d 1043, 1044 (Miss. 1980)(annual maintenance assessment was covenant running with land; defendant, who purchased property subject to this covenant, was obligated to pay assessments); Mendrop v. Harrell, 233 Miss. 679, 690, 103 So. 2d 418, 423 (1958)(covenant to pay for street paving ran with land and was enforceable against successors in title). The court next listed the basic steps for forming a homeowners association. *Perry*, 486 So. 2d at 1233. These steps are:

> (1) preparation and recording the subdivision plat of the development;
> (2) preparation and recording of a declaration of covenants and restrictions applicable to the land within the subdivision;
> (3) preparation of the articles and by laws of a homeowners association and its incorporation; and
> (4) sale and conveyance of the homes by deed that confirms the rights and duties which are provided for in the first three steps.

Id.; ROHAN, 6 HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS, § 4.01 (1986). The court also stated that a homeowners association comes into existence at the time documents which create the association are recorded. *Perry*, 486 So. 2d at 1233.

issues: whether property control may be increased; whether the homeowners association, by amendment, may impose maintenance assessments for common areas; and the nature and scope of judicial review of such modifications.[68]

On the issue of increased property control, the court focused on the intent of the original declaration and notice to property owners.[69] The court found that increased control was intended by the original declaration because it contemplated a general development scheme, building restrictions, areas for common use, and contained a procedure for amendments.[70] Regarding notice, the court held that the original declaration, which was recorded, gave constructive notice and appellants' signatures (or that of their predecessors in title) on the amended declaration constituted actual notice.[71] The court concluded that intent to enlarge property control was clearly contemplated by the original declaration and that appellants were on notice thereof.[72]

Concerning maintenance assessments, the appellants argued that the assessments were not contemplated by the original covenants.[73] The court disagreed, holding that they were clearly contemplated by the original declaration and that an implied covenant by necessity existed which permitted the association to assess reasonable fees.[74]

The final issue considered by the court was the power and scope of judicial review of actions taken by homeowners associations. Noting that a homeowners declaration may be reviewed in either law or equity, the court held that judicial review must focus on the intent of the original declaration and that it must be judged by a standard of

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Upon taking title to property subject to a homeowners association, the property owner automatically becomes a member of the association and the covenants may be enforced against him. W. HYATT, CONDOMINIUM AND HOMEOWNERS ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW, 35 (1981)(cited by the court in *Perry*, 486 So. 2d at 1233). The people in control of the homeowners association are fiduciaries in operating the homeowners association. HYATT, *supra* at 40. Lastly, the court noted that homeowners associations have power, granted in the declaration, to control property use, home design and maintenance of common areas. *Perry*, 486 So. 2d at 1233.

[68] *Perry*, 486 So. 2d at 1233-34.

[69] *Id.* at 1234.

[70] *Id.* The court pointed to provisions in the declaration stating that the covenants ran with the land, and providing procedures for amendment and imposition of dues. *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* Although the covenant in the original declaration provided for dues and not assessments, the court noted that the bylaws construed the terms synonymously. *Id.*

[74] *Id.* The court stated that "in a community association, the members enjoy the benefits of the development; the landowners thereby imply consent to the assessment for reasonable maintenance common to all other members." *Id.*

reasonableness.[75]

In summary, the court held that both the enlargement of powers in the new bylaws and imposition of maintenance assessments were consistent with the intent of the original declaration and that the appellants were on constructive and actual notice of them. The chancellor's decision was affirmed.[76]

The second decision rendered by the Mississippi Supreme Court in 1986 concerning homeowners associations was *Edwards v. Bridgetown Community Ass'n, Inc.*,[77] a companion case to *Perry*.[78] While the underlying facts were the same as those in *Perry*, the lawsuit in this case arose from actions taken by Bridgetown Community Association, appellee, in enforcing the restrictive covenants and bylaws requiring assessments for maintenance of common areas.[79] In *Edwards*, appellants refused to pay the assessments, and in October of 1979 Bridgetown Community Association filed notice in lis pendens.[80] Describing the action as a lien for enforcement of the covenant, the lis pendens notice stated that "[a] suit will be filed for enforcement of the lien."[81] Six months later, appellants received letters from their mortgage company which stated that failure to pay the assessments constituted a breach of the deed of trust and warned that further action would be taken.[82] Several days later each of the appellants paid $143.00, under protest, and filed suit against Bridgetown Community Association, asking for compensatory damages for slander of title, defamation by statements filed in lis pendens and intentional interference with mortgage contracts.[83] The chancery court dismissed the complaint with prejudice

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[75] *Id.* The court followed Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975), in which the Florida court stated that "[w]e believe the test is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot." *Hidden Harbour Estates*, 309 So. 2d at 182.

[76] *Perry*, 486 So. 2d at 1235.

[77] *Id.*

[78] *See supra* notes 58-76 and accompanying text.

[79] *Edwards*, 486 So. 2d at 1237. Bridgetown Community Association, Inc., successor of Lakewood Estates Association, filed amendments in 1975 to original restrictive covenants. *Id. See supra* notes 64 and accompanying text (discussion of amendment to covenants).

[80] *Edwards*, 486 So. 2d at 1237. Appellants purchased lots in the subdivision, subject to the twenty-one original covenants, in 1972 and 1973 respectively. *Id.* at 1236. The covenant imposing maintenance assessments was filed in 1975 as part of an agreement to amend the protective covenants. *Id.* at 1237.

[81] *Id.* at 1237. Bridgetown Community Association never filed suit to enforce the covenant. *Id.* at 1238.

[82] *Id.* at 1237.

[83] *Id.* at 1237-38. Appellants also sought damages for payment, under duress, of

and appellants perfected their appeal.[84]

The first assignment of error considered by the Mississippi Supreme Court on appeal was the chancellor's finding that membership in the homeowners association was mandatory.[85] Holding that the issue was controlled by *Perry*,[86] the court affirmed the chancellor's finding that membership in a homeowners association is both automatic and mandatory.[87] The second assignment of error was that the lower court erred in holding that dues and assessments imposed pursuant to a restrictive covenant by the homeowners association were superior to appellants' purchase money mortgages.[88] Noting that under Mississippi law a recorded restrictive covenant constitutes a lien on the land, the court reasoned that the issue was one of priority between the assessment lien and the purchase money mortgage.[89] The court held that since the assessment lien was created and recorded by amendments which were made subsequent to the creation of the deed of trust, the bank's lien was superior.[90] Thus, the court held that the mortgage company was without authority under its deed of trust to order appellants to pay the assessments.[91] An ancillary issue was whether the association dues were "assessments" within the language of the deeds of trusts, nonpayment of which permitted the mortgage company to take action to encourage payment.[92] The court reasoned that under Mississippi case law, statutory law and the language in the deed of trust, the term "assessment" refers to a local tax; the court held that homeowners association dues were not assessments which permitted the mortgage company to take action under its deed of trust.[93] The court thus

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money not owed; intentional infliction of mental distress; and damages under 42 U.S.C. § 1983 (1982) for violation of their fifth amendment rights through wrongful use of lis pendens notices. *Edwards*, 486 So. 2d at 1237-38.

[84] *Edwards*, 486 So. 2d at 1238.

[85] *Id.*

[86] *See supra* notes 58-76 and accompanying text.

[87] *Edwards*, 486 So. 2d at 1238.

[88] *Id.* at 1238-39.

[89] *Id.*; *see* Mendrop v. Harrell, 233 Miss. 679, 690-91, 103 So. 2d 418, 423-24 (1958)(recorded restrictive covenant runs with land and lien on land is created to enforce it).

[90] *Edwards*, 486 So. 2d at 1239. Deeds of trust were given and filed in 1972 and 1973, and the covenants imposing maintenance assessments were filed in 1975. *Id.* at 1236-37.

[91] *Id.* at 1239.

[92] *Id.* Both deeds of trust stated, "[h]e will pay all taxes, assessments, water rates, and other governmental or municipal charges, fines or impositions . . . ." *Id.*

[93] *Id.* The court cited Macon v. Patty, 57 Miss. 378, 386 (1879), which held that an assessment is like a tax and that "it must be levied for a public purpose . . . ." *Macon*,

reversed the chancellor's finding on this question.[94]

The third assignment of error focused on the chancellor's finding that the appellants failed to prove malice for their slander of title claim against Bridgetown Community Association for filing notice in lis pendens without instituting legal action.[95] Finding that the chancellor erred, the court held that filing lis pendens notice without filing suit could constitute malice for a slander of title action and remanded the case to allow the appellants an opportunity to prove malice.[96]

In summary, the court affirmed the chancellor's finding that membership in a homeowners association was mandatory, but held that the chancellor erred both in holding that homeowners association dues assessed in 1975 were superior to purchase money mortgages given in 1972 and 1973, and in holding that filing lis pendens notice without instituting a lawsuit could not constitute malice for a slander of title claim.[97]

III. Triggering Due-On-Sale Clauses

In *Unifirst Federal Savings & Loan Ass'n v. Tower Loan of Mississippi, Inc.*,[98] the Mississippi Supreme Court rendered a decision that will have an impact on the relationship between holders of first security interests in real property and holders of subordinated security interests. In August of 1977 Mickey and Marilyn Ellzey executed a deed of trust containing a typical due-on-sale clause to Unifirst Federal Savings & Loan Association (Unifirst), appellant, to secure a $28,000 note.[99] In June of 1979 the Ellzeys executed a second deed of trust

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57 Miss. at 366.

[94] *Edwards*, 486 So. 2d at 1239-40.

[95] *Id.*

[96] *Id.* at 1240. One of the fundamental prerequisites concerning use of lis pendens is that a lawsuit has been initiated:

> [i]n order that the doctrine of lis pendens may apply, so that purchasers of property may be bound by the judgment or decree rendered, it is essential that there be in existence a pending action, suit, or proceeding, and there can be no lis pendens because of the fact that an action or suit is contemplated.

Id. at 1240 (quoting from 54 C.J.S. *Lis Pendens* § 17 (1948)).

[97] *Edwards*, 486 So. 2d at 1240.

[98] No. 55,953 (Miss. Nov. 19, 1986).

[99] *Id.* The due-on-sale clause provided that:

> [i]f all or any part of the property or an interest therein is sold or transferred by borrower without lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this deed of trust, . . . lender may at lender's option declare all the sums secured by this deed of trust to be immediately due and payable.

securing a $14,299.32 note to Central Finance Services, Inc., who sold and assigned it to Tower Loan of Mississippi, Inc., appellee, in September of 1983.[100] Following default on the note secured by the second deed of trust, the trustee conducted a public foreclosure sale in October at which Tower Loan purchased the property for $12,127.86.[101] No prior written consent, however, was obtained from Unifirst as required by the due-on-sale clause in its deed of trust.[102] In January of 1984, Unifirst accepted payment owed for three previous months from Tower Loan.[103] However, in March of 1984, Unifirst invoked the due-on-sale clause in its deed of trust and informed Tower Loan that the entire amount of remaining indebtedness was due.[104] Tower Loan responded by filing suit in April of 1984 in chancery court seeking declaratory, injunctive and other relief.[105] Holding that creation and enforcement of the second deed of trust was an exception to the due-on-sale clause in the Unifirst deed of trust, the chancellor enjoined Unifirst from accelerating the amount due and foreclosing on the deed of trust.[106] Unifirst appealed.

The question on appeal was whether foreclosure on the second deed of trust by Tower Loan constituted a sale or transfer within the language of the due-on-sale clause contained in the first deed of trust held by Unifirst.[107] Tower Loan argued that by its own language, the due-on-sale clause required transfer by the borrowers and that transfer of title by a trustee's deed did not constitute a transfer by the borrower.[108] The court rejected this argument and noted that under Mississippi law a trustee is an agent of the grantor (the borrower) and that transfer by a trustee's deed is the legal equivalent of a transfer by the borrower.[109] Construing the language of the due-on-sale clause in the

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Id.

[100] *Id.* slip op. at 1-2.

[101] *Id.* slip op. at 2. The fair market value of the property was approximately $40,000.00. *Id.*

[102] *Id.* slip op. at 3.

[103] *Id.* slip op. at 2.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* slip op. at 1.

[108] *Id.* slip op. at 3.

[109] *Id.* The court cited Vincent v. J.W. McClintock, Inc., 200 Miss. 445, 27 So. 2d 681 (1946) for this proposition, in which it was stated that:

> [w]hen the mortgagor conveys property to a trustee and thereby authorizes the trustee to make a sale thereof in cases of default in the payment of the secured debt, the trustee in making the sale is the agent of the mortgagor as well as of

Unifirst deed of trust broadly, the court reasoned that the words "sold or transferred" included judicial foreclosure.[110] The court therefore held that since Unifirst did not give its consent, the due-on-sale clause provision was triggered when Tower Loan purchased the property at the foreclosure sale and received a substitute trustee's deed.[111] Finally, the court stated that since the indebtedness secured by the first deed of trust had not been paid by Tower Loan, Unifirst could institute foreclosure proceedings.[112] The chancery court judgment was accordingly reversed and the case was remanded for further proceedings.[113]

IV. Standard for Measuring Damages Caused by Waste

The Mississippi Supreme Court for the first time in *Bell v. First Columbus Nat'l Bank*[114] developed a standard for measuring damages caused by waste. In May of 1973 John and Sharon Bell, appellants, executed a deed of trust on their residence in favor of First Federal Savings and Loan Association of Columbus (First Federal).[115] In May of 1974, July of 1980 and June of 1981, the Bells executed a second deed of trust on the residence to First Columbus National Bank (the

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> mortgagee, and when he has made a valid sale, his deed evidencing it is of the same legal effect as had the mortgagor and the mortgagee made the deed themselves, for the purchaser pays the purchase money to and for the mortgagor on the debt held by the mortgagee.

Id. 200 Miss. at 455, 27 So. 2d at 682.

[110] *Unifirst*, slip op. at 3. The court stated that "[t]hese words do not include the *granting* of a lien, encumbrance or other security interest. They do include the *enforcement, execution or foreclosure* of any such lien, encumbrance or other security interest which results in another party acquiring all of the incidents of ownership." *Id.* (emphasis in original).

[111] *Id.* slip op. at 5. The authority cited by the court in support of its holding was Federal Home Loan Bank Board Regulation, 12 C.F.R. § 591.2(b) (1984). *Unifirst*, slip op. at 3. The regulation, defining due-on-sale clauses, states that:

> [f]or purposes of this definition, a "sale or transfer" means the conveyance of real property of any right, title or interest therein, whether legal or equitable, whether voluntary or involuntary, by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three years, lease-option contract or any other method of conveyance of real property interests.

12 C.F.R. 591.2(b) (1984). This section was carried forward without change at 12 C.F.R. § 591.2(b) (1986).

[112] *Unifirst*, slip op. at 5. The court noted that Unifirst acted seasonably (five months after the foreclosure sale) in notifying Tower Loan that the entire indebtedness under the first deed of trust was due. *Id.*

[113] *Id.*

[114] 493 So. 2d 964 (Miss. 1986).

[115] *Id.* at 966.

bank) as security for business ventures.[116] Due to business reversal the loans owed to both First Federal and the bank became overdue, and in July of 1983 the Bells filed a voluntary petition in bankruptcy in federal court.[117] Following the conclusion of bankruptcy proceedings, First Federal began foreclosure proceedings on its deed of trust.[118] On February 12, 1984, five days prior to First Federal's foreclosure sale, the Bells held a garage sale at which they sold fixtures severed from the house.[119] The bank purchased the property at the foreclosure sale and paid First Federal the balance owed on its loan.[120] In April of 1984 the bank filed suit in the Circuit Court of Lowndes County alleging that covenants of reasonable repair and no waste contained in each deed of trust were breached and sought repair and replacement expenses for the fixtures sold by the Bells, in the amount of $5,350.00 and punitive damages of $5,000.00.[121] Following a jury verdict for the bank in the amount of $5,350.00 in actual damages and $1,500.00 in punitive damages, the Bells appealed.[122]

On appeal, the Bells first argued that by purchasing the property at the foreclosure sale, the bank could no longer claim the benefit of the reasonable repair and no waste covenant in its deeds of trust.[123] The court held that although the bank held title as a purchaser and not as a second mortgagee, both the covenant obligations in the deeds of trust and the bank's right to enforce them survived the foreclosure sale.[124] The bank could thus recover losses proximately caused by

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[116] *Id.*

[117] Id.

[118] *Id.*

[119] *Id.* A bank vice-president inspected the property after the foreclosure sale and found that carpet, electrical fixtures (including ceiling fans) and closet doors and jams had been removed. *Id.* at 966-67.

[120] *Id.* at 966.

[121] *Id.* at 967. The covenant, in each deed of trust, stated that the Bells would "keep the improvements thereon in reasonable repair and not permit waste of said property . . . ." *Id.*

[122] *Id.*

[123] *Id.* at 967-68.

[124] *Id.* at 968-69. The court stated that "[t]hose obligations were not extinguished in the foreclosure sale nor was the bank's right to enforce them waived or in other ways lost." *Id.* at 968. In Snead v. Dooley, 221 Ala. 598, 130 So. 222 (1930)(cited by the court in *Bell*, 493 So. 2d at 968), the Alabama Supreme Court stated that "when a second mortgagee buys at the foreclosure sale of the first mortgage, the purchaser, though a second mortgagee, thereafter holds as a purchaser at foreclosure sale, and not as a second mortgagee." *Snead*, 130 So. 2d at 223.

breach of the covenants.[125]

Second, the Bells asserted that the circuit court erroneously used replacement cost as the measure of damages.[126] In addressing this issue, the court noted that while in Mississippi a mortgagor's liability for damaging mortgaged property is governed by the law of waste,[127] no standard had ever been adopted for measuring damage caused by waste.[128] Synthesizing damage standards used in other contexts, the court held that where personal property has been damaged but can be repaired, the plaintiff can choose either reasonable cost of replacement or repairs or diminution in value as his measure of damages.[129] Under both standards, the court noted, recovery must not result in unjust enrichment.[130] The court found that the bank chose reasonable cost of

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[125] *Bell*, 493 So. 2d at 968.

[126] *Id.* at 969. The bank's witness gave an estimate of repair and replacement cost of the fixtures moved, while the Bells' evidence focused on the age of the fixtures (eleven years) and the small amount of useful life left in them. *Id.* The Bells thus argued that the bank's damages should reflect the actual value of the items and material removed rather than replacement cost for new items and material. *Id.*

[127] *Id.*; *see* Planters Mfg. Co. v. Greenwood Agency Co., 168 Miss. 892, 899, 152 So. 476, 477 (1934)(mortgagor's liability for impairing value of mortgaged property determined by law of waste).

[128] *Bell*, 493 So. 2d at 969.

[129] *Id.* at 969-70. Citing Lipton Realty, Inc. v. St. Louis Hous. Auth., 705 S.W.2d 565, 569 (Mo. App. 1986); Meyer v. Hansen, 373 N.W.2d 392, 396 (N.D. 1985); and 78 AM. JUR. 2D WASTE § 35 (1975), the court stated the general rule that the measure of damages for waste is the before and after value of the property. *Bell*, 493 So. 2d at 969. Several states, the court observed, permit either the before and after standard or reasonable cost of repair standard. *Id.* In *Meyer*, 373 N.W. at 396, for example, the court stated that "[T]here should be no exclusive test for measuring property damage for waste. Rather, it is best to adopt the more flexible approach in which the mode and amount of proof must be adapted to the facts of each case." *Id.* at 396. Discussing Mississippi law on damage to property, the court noted that both the cost of repair and the before and after standards are recognized. *Bell*, 493 So. 2d at 969-70; *see, e.g.*, Harper v. Hudson, 418 So. 2d 54, 57 (Miss. 1982)(if damaged property has any value, measure of damages is difference between before and after value); Teledyne Exploration Co. v. Dickerson, 253 So. 2d 817, 819 (Miss. 1971)(where property damaged by seismic exploration is reparable, measure of damage is cost of repair). The court noted that this inconsistency in Mississippi case law is harmonized in Thomas v. Global Boat Builders & Repairmen, Inc., 482 So. 2d 1112, 1115 (Miss. 1986), in which the court held that both repair cost and diminution in value after repairs should be examined in measuring damages to reparable property. *Bell*, 493 So. 2d at 970. The court in *Thomas* concluded that application of either the repair or replacement standard or the before and after standard should achieve the same result. *Thomas*, 482 So. 2d at 1115. Carrying *Thomas* one step further, the court in *Bell* held that either standard could be used to prove damages. *Bell*, 493 So. 2d at 970.

[130] *Bell*, 493 So. 2d at 970.

repair and replacement as its measure of damages and was not unjustly enriched by the verdict of $5,350.00.[131]

Lewis W. Bell

[131] *Id.* The court found ample evidence to affirm the jury verdict of $1,500 in punitive damages. *Id.* at 971.

TORTS

In 1986, the Mississippi Supreme Court decided forty-seven cases involving torts. Issues addressed included strict liability in tort,[1] medical malpractice,[2] negligence *per se*,[3] attractive nuisance,[4] standard of care,[5] duty owed to the trespasser,[6] duty owed to an invitee,[7] duty

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[1] Hattiesburg Coca-Cola Bottling Co. v. Barrett, 497 So. 2d 809, 811 (Miss. 1986)(showing of negligence on part of manufacturer not required to prove strict liability claim); Coca-Cola Bottling Co. v. Reeves, 486 So. 2d 374, 375-76 (Miss. 1986)(law of strict liability in tort as stated in RESTATEMENT (SECOND) OF TORTS § 402A (1965) is general law of Mississippi); *see infra* notes 24-72 and accompanying text.

[2] Phillips v. Hull, 516 So.2d 488, (Miss. 1987)(affidavits of expert witness required to survive summary judgment in suit for failure to obtain informed consent for medical treatment); Latham v. Hayes, 495 So. 2d 453, 458 (Miss. 1986)(test of informed consent is whether physician disclosed sufficient information so that reasonable prudent person could have decided whether to have operation); Boyd v. Lynch, 493 So. 2d 1315, 1318-19 (Miss. 1986)(hospitals not liable for medical malpractice, however may be liable for injuries to patients under other theories: negligence, contract, express warranty, or agency); Marshall v. Clinic for Women, P.S., 490 So. 2d 861, 865 (Miss. 1986)(where some warning concerning effects of treatment was given, plaintiff has burden of establishing proper standard of care plus failure to follow such standard); Scafidel v. Crawford, 486 So. 2d 370, 372 (Miss. 1986)(party not required to provide information concerning subject matter of fact witness's testimony); Smith v. Sanders, 485 So.2d 1051, 1052 (Miss. 1986)(in medical malpractice cases statute of limitation begins to run when it can be reasonably said that patient knew of injury itself, cause of injury, as well as causual relationship between medical personnel, and injury); Smith v. Lee, 484 So. 2d 1028, 1031 (Miss. 1986)(question of competency of medical expert witness same as other types of experts).

[3] Gregg v. Four Squires, Ltd., 498 So. 2d 362, 364 (Miss. 1986)(instruction charging personal injury liability to one who serves alcohol to obviously intoxicated person must follow statutory language, be supported by evidence, as well as not being peremptory); Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 348-49 (Miss. 1986)(seller of alcohol not civilly liable to adult, voluntary inebriate who because of inebriation injures self); McRee v. Raney, 493 So. 2d 1299, 1300-01 (Miss. 1986)(where plaintiff establishes negligence *per se* as matter of law, he must further establish that negligence was proximate cause of his injuries to establish liability).

[4] Goodwin v. Jackson, 484 So. 2d 1041, 1044-45 (Miss. 1986)(absent contractual obligation or assumption of obligation to third parties, permissive safety inspection by insurer does not obligate insurer to third party; absent special risks, attractive nuisance doctrine not applicable to water hazards).

[5] McKinnon v. Batte, No. 55,348 (Miss. March 19, 1986)(standard of care of required insurance agent is to act as reasonably prudent person would act in exercise of his own business; standard of care required of surveyor is that degree of care exercised by surveyor of ordinary skill and prudence); Evans v. Journeay, 488 So. 2d 797, 800 (Miss. 1986)(where plaintiff's negligence was sole proximate cause of his injuries, granting directed verdict for defendant at close of plaintiff's case was proper); Butler v. Lott Furni-

owed by lessee to invitee,[8] municipality's duty to residents,[9] utility's duty,[10] contributory negligence,[11] "second impact" doctrine,[12] sovereign immunity,[13] malicious prosecution,[14] wrongful destruction of trees,[15]

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ture Co., 482 So. 2d 1134, 1135-36 (Miss. 1986)(instruction couched in language of whether defendant acted as reasonable person would have acted under like circumstances does not run afoul of abolition of sudden emergency doctrine).

[6] McQuire v. Cheleno, 499 So. 2d 785, 786 (Miss. 1986)(proprietary interest by defendant prerequisite to existence of duty to invitee or licensee); Adams v. Freds Dollar Store, 497 So. 2d 1097, 1101 (Miss. 1986)(duty owed to trespasser by owner or occupant was not to willfully or wantonly injure trespasser); Holley v. International Paper, Co., 497 So. 2d 819, 819 (Miss. 1986)(duty owed to licensee on non-posted land is not to willfully or wantonly injure licensee).

[7] Howard Bros. of Phoenix City, Inc. v. Penley, 492 So. 2d 965, 967-69 (Miss. 1986)(before delivery of firearm to purchaser, licensed firearms dealer had both statutory plus common law duty to ascertain age as well as mental condition of firearm purchaser); Waller v. Dixieland Food Store Inc., 492 So. 2d 283, 286 (Miss. 1986)(where proof showed condition could have arisen immediately prior to plaintiff's injury, liability based on constructive knowledge of condition, because of length of time condition existed, must fail); Hathorn v. Hailey, 487 So. 2d 1342, 1344 (Miss. 1986)(owner owed duty to invitee to keep premises in reasonably safe and suitable condition, to warn of hidden dangers about which owner knows).

[8] Wilson v. Allday, 487 So. 2d 793, 797 (Miss. 1986)(where lessee's use of area incident to leasehold was tantamount to possession and control, he owed duty to invitee despite contractual maintenance agreement with lessor).

[9] Maryland Casualty Co. v. City of Jackson, 493 So. 2d 955, 960-61 (Miss. 1986)(when requested by resident to shut off water to house, city's duty was to shut off water supply, not to remove water meter).

[10] Garcia v. Coast Elec. Power Ass'n, 493 So. 2d 380, 382 (Miss. 1986)(requirement of highest degree of care to be used by utility company when supplying electricity does not, as matter of law, establish liability of utility where facts are disputed).

[11] City of Jackson v. Copeland, 490 So. 2d 834, 839 (Miss. 1986)(reversible error to grant contributory negligence instruction without defining what facts would constitute such negligence unless another instruction correctly informs jury what those facts were).

[12] Ward v. Ford Motor Co., 484 So. 2d 363, 363 (Miss. 1986)(Mississippi has adopted second impact doctrine); Rose v. Mercury Marine, 483 So. 2d 1351, 1351 (Miss. 1986)(second impact doctrine, as adopted by Mississippi, allows injured party to sue manufacturer of negligently designed product for injuries proximately caused or enhanced by defect).

[13] Mississippi *ex rel.* Brazeale v. Lewis, 498 So. 2d 321, 323 (Miss. 1986)(county supervisor immune from suit for alleged negligent maintenance of county road).

[14] Royal Oil Co. v. Wells, 500 So. 2d 439, 444 (Miss. 1986)(probable cause determined by facts reasonably available to defendant at time suit instituted; lack of probable cause is circumstantial evidence of malice); Woolfolk v. Tucker, 485 So. 2d 1039, 1043 (Miss. 1986)(all instructions to jury must be read together to determine whether proper instruction was given on elements of malicious prosecution).

[15] Shell Oil Co. v. Murrah, 493 So. 2d 1274, 1276 (Miss. 1986)(punitive damages available against one who willfully, wantonly destroys trees of another; good faith of trespasser who destroys trees does not defeat award of punitive damages); Nichols v. Stacks,

tortious interference with contract,[16] wrongful death resulting from intentional shooting,[17] invasion of privacy,[18] defamation,[19] bad faith refusal to pay,[20] damages,[21] judgments,[22] and remittitur.[23] Of these cases, four have been chosen for discussion because of their clarification or alteration of the law of torts in Mississippi.

I. Strict Liability in Tort

In *Coca-Cola Bottling Co. v. Reeves*,[24] the Mississippi Supreme Court, in a divided opinion, reexamined the state of products liability law in Mississippi.[25] The cause of action in *Reeves* arose on May 6, 1980, when Geraldine Smith and her nephews, Antwan and Erek

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485 So. 2d 1034, 1037 (Miss. 1986)(where statutory penalty for wrongful destruction of trees was justified, party only required to offer proof enabling reasonable estimate of actual damages).

[16] Vestal v. Oden, 500 So. 2d 954, 957 (Miss. 1986)(not tortious for agent on behalf of his principal to terminate at will contract of third party).

[17] Roberts v. Grisham, 493 So. 2d 940, 942 (Miss. 1986)(homestead exemption available to one convicted of murder, even though sentenced to life imprisonment; therefore, homestead property exempt from execution of wrongful death judgment).

[18] Candebat v. Flanagan, 487 So. 2d 207, 209, 212 (Miss. 1986)(tort of invasion of privacy is four sub-torts each with separate elements and damages; recovery for invasion of privacy not predicated on showing of pecuniary or proprietary damages but on wrong to personal character).

[19] Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215, 1216 (Miss. 1986)(statement must be "false and defamatory" to support action in defamation); Prescott v. Bay St. Louis Newspaper Inc., 497 So. 2d 77, 81 (Miss. 1986)(motorist privacy not invaded where published stories concerning motorist's arrest for drunk driving were accurate); Whitten v. Commercial Dispatch Publishing Co., 487 So. 2d 843, 844-45 (Miss. 1986)(to state claim for defamation of public figure one must show malice or reckless disregard of falsity; for private person one must show negligence; mere participation in newsworthy event will not render person "public figure").

[20] Aetna Casualty & Sur. Co. v. Day, 487 So. 2d 830, 833-34 (Miss. 1986)(general rule was that unless insured was entitled to peremptory instruction on liability claim, insurer insulated from punitive damages instruction).

[21] Thomas v. Global Boat Builder & Repairmen Inc., 482 So. 2d 1112, 1115 (Miss. 1986)(two elements in recovery of loss of personality, cost of repairs, depreciation).

[22] Cobb v. Cobb, No. 55,432 (Miss. March 19, 1986)(award of damages for pain, suffering may be supported by lay testimony); Matkins v. Lee, 491 So. 2d 866, 868 (Miss. 1986)(jury award which was not responsive to evidence, against overwhelming weight of evidence may be basis for inferring bias on part of jury).

[23] Holmes County Bank & Trust Co. v. Staple Cotton Coop. Ass'n, 495 So. 2d 447, 451 (Miss. 1986)(jury verdict not subject to remittitur unless so excessive as to shock enlightened conscience of court).

[24] 486 So. 2d 374 (Miss. 1986).

[25] *Id.* at 377-80.

Reeves, went into Traceway Shopette to exchange some soft drinks.[26] As Mrs. Smith lifted a Coca-Cola carton containing ten ounce bottles, one of the bottles fell and broke.[27] It was undisputed that the bottle shattered and several splinters of glass entered the left eye of Erek Reeves.[28] Erek experienced a serious, permanent injury to his eye.[29] Subsequently, Erek, by and through his mother, sued the Coca-Cola Bottling Company of Vicksburg (Vicksburg Coke)[30] under theories of strict liability in tort, implied warranty, and negligence.[31] Following a jury award of $52,037.34, the court granted plaintiff's motion for an addition of $75,000 which Vicksburg Coke refused to accept, opting for a new trial which resulted in an award of $250,000 for Reeves.[32]

To begin its analysis, the Mississippi Supreme Court outlined the present state of law of strict liability in tort in Mississippi, the parameters of which were established by *State Stove Manufacturing Co. v. Hodges*,[33] and its progeny.[34] The court reiterated its adoption of the

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[26] *Id.* at 376. Erek Damond Reeves was 21 months old at the time; Mrs. Smith was 23 years old. *Id.* Pursuant to an agreement between Mrs. Smith and the proprietor of the Traceway Shopette, Mrs. Smith came to the store to exchange a quantity of Dr. Peppers, purchased elsewhere, for a quantity of Coca-Cola. *Id.*

[27] *Id.* It was disputed whether the carton contained six or eight bottles when it gave way releasing a bottle approximately two to three feet above the floor. *Id.* An employee of Traceway confirmed that the carton had a tear in the bottom and the sides were worn. *Id.* at 377.

[28] *Id.* at 376.

[29] *Id.* Although there was no dispute as to the fact of Erek's injuries, there was conflict as to the exact extent and permanence of Erek's visual injury. *Id.* Dr. Donald Hall testified that Erek had a less than fifty percent vision loss in his left eye while Dr. Samuel Johnson testified to a ninety-four to ninety-six percent vision loss. *Id.*

[30] *Id.* at 377. It was uncontroverted that Vicksburg Coke had the exclusive right to distribute Coca-Cola in Warren and Claiborne counties, and that Vicksburg Coke distributed Coca-Cola in cardboard cartons to Traceway Shopette. *Id.* Relying on the plaintiff's allegation that the carton contained six bottles, Vicksburg Coke contended that because it distributed only eight bottle cartons the offending carton could not have been one of theirs. *Id.* The court, finding no credible evidence for another source of the carton, found that "the only conclusion which could rationally be drawn . . . was that the carton in issue had been furnished by Vicksburg Coke." *Id.* The plaintiff, however, failed to produce the carton, therefore exact determination was not possible. *Id.* at 378; *see infra* note 52 and accompanying text (discussing Powe v. Wagner Elec. Sales Corp., 589 F. Supp. 657, 661 (S.D.Miss. 1984) in which court held that production of offending product was prerequisite to product liability recovery in absence of other evidence).

[31] *Reeves*, 486 So. 2d at 377.

[32] *Id.* In the second trial "the jury determined that the first verdict was not the real thing" awarding $250,000 from which the trial court ordered a $62,500 remittitur, leaving a judgment in the sum of $187,500. *Id.*

[33] 189 So. 2d 113, 118 (Miss. 1966).

[34] *See, e.g.*, Toliver v. General Motors Corp., 482 So. 2d 213, 214-19 (Miss.

general rule gleaned from section 402A of the Restatement (Second) of Torts.[35] Section 402A was held to apply even though:

> (a) The seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[36]

The court recognized that liability existed, if the three elements of section 402A existed.[37] In addition, the court noted two nuances of the general rule, *viz.*, the protection by the products liability laws of one "who may reasonably be expected to be in the vicinity of the product's probable use,"[38] and potential liability extends to "one who sells or distributes" a product of another as his own.[39]

1985)(causation of injury and adoption of second impact theory); Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1046-47 (Miss. 1985)(intervening alteration of product insulated manufacturer from liability); Early-Gary, Inc. v. Walters, 294 So. 2d 181, 185-86 (Miss. 1974)(quoting RESTATEMENT (SECOND) OF TORTS § 402(A)); Falstaff Brewing Corp. v. Williams, 234 So. 2d 620, 624 (Miss. 1970)(strict liability resulting from exploding beer bottle); Ford Motor Co. v. Cockrell, 211 So. 2d 833, 836 (Miss. 1968)(stating general rule).

[35] RESTATEMENT (SECOND) OF TORTS § 402A (1977). Section 402A states:

> one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id.

[36] *Reeves*, 486 So. 2d at 378.

[37] *Id.* The three elements which must be met are: "(1) That the plaintiff was injured by the product, (2) that the injury resulted from a defect in the product which rendered it unreasonably dangerous, and (3) that the defect existed at the time it left the hands of the . . . [seller]." *Id.*; *see* Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974)(court enunciated elements that must be established at trial).

[38] *Reeves*, 486 So. 2d at 378. *See* Lovelace v. Astra Trading Corp., 439 F. Supp. 753, 759 (S.D. Miss. 1977)(foreseeability implicitly applied); Ford Motor Co. v. Cockrell, 211 So. 2d 833, 836 (Miss. 1968) (same). The court concluded that the possible classification of Reeves as a bystander did not alter Vicksburg Coke's liability; it can be expected that children shopping with their parents or others will be in the vicinity of soft drinks being handled, and that defective cartons containing those soft drinks would endanger these children. *Reeves*, 486 So. 2d at 378. The court arrived at this conclusion by determining it was more equitable to allow recovery to bystanders than to other potential plaintiffs because a bystander had less ability to avoid the accident. *Id.* at 378 n.2.

[39] *Reeves*, 486 So. 2d at 378. In Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935), Swift, an Illinois company, apparently sold cheese as their own which was manufactured either by Pauly & Pauly of Wisconsin or Swift & Co. of Iowa. *Id.* at 254, 164 So.

The majority severely criticized the holding in *Sam Shainberg Co. of Jackson v. Barlow*[40] wherein a retailer was insulated from liability for injuries resulting from latent defects in the product "if [the retailer] is a mere conduit of the product which he has purchased from a reputable manufacturer . . . ."[41] Referring to the holding in *Shainberg* as "anomalous if not irrational,"[42] the court stressed the antiquated reasoning supporting *Shainberg* in light of present indemnity law.[43] However "anomalous" *Shainberg* is, the majority found the facts in *Reeves* distinguishable from *Shainberg*, rendering inappropriate the overruling of *Shainberg*.[44] Because *Shainberg* proceeded on the thesis that the consumer should look to the manufacturer for redress of injuries rather than the retailer, reliance on *Shainberg* was inappropriate because the consumer in *Reeves* sought recovery from the manufacturer, Vicksburg Coke.[45]

Vicksburg Coke attacked the legal sufficiency of the evidence and

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at 231. Although Swift & Co. of Illinois did not manufacture the defective cheese, the Mississippi Supreme Court followed § 400 of the *Restatement* holding that "one who puts out as his own a chattel manufactured by another is subject to the same liability as though he were its manufacturer." *Id.*, 164 So. at 232.

[40] 258 So. 2d 242 (Miss. 1972).

[41] *Id.* at 246. The holding in *Shainberg* relieves a retailer from liability for marketing a "defective and unreasonably dangerous product." *Id.* Although not followed in a decade, the *Reeves* court noted that *Shainberg* was followed in Parker v. Ford Motor Co., 331 So. 2d 923, 925 (Miss. 1976) and in Early-Gary, Inc. v. Walters, 294 So. 2d 181, 187 (Miss. 1974). *Reeves*, 486 So. 2d at 379 n.3.

[42] *Reeves*, 486 So. 2d at 379.

[43] *Id.* at 379 n.4. Justice Robertson explained that the policy arguments that retailers do not have an adequate means of protection from liability which occurs without any fault on their part fails to consider the operation of indemnification law which would give relief from liability. *Id.*

Justice Robertson further criticized the *Shainberg* opinion pointing out that *Shainberg* relies upon FRUMER & FRIEDMAN PRODUCTS LIABILITY § 18.01, at 453 (1970); but, the specific section applies "*to negligence principles only* and was never intended to restrict the scope of the strict liability in tort doctrine." *Reeves*, 486 So. 2d at 379 (emphasis in original). In fact, as Justice Robertson noted, Frumer and Friedman recognized the misapplication by the *Shainberg* court. *Id.* at 379 n.5; *see* 2A FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 19A[1], at 5-225 to 5-226 (1984).

[44] *Reeves*, 486 So. 2d at 379. The distinguishing fact was that instead of being a mere retailer of a product manufactured by another, as in *Shainberg*, Vicksburg Coke manufactured the liquid, placed it in bottles, placed the bottles in the cartons, and placed the cartons in Traceway Shopette. *Id.* at 379-80.

[45] *Id.* at 380. The court found that the consumer or bystander under the present facts "may reasonably be expected . . . to rely solely upon Vicksburg Coke," whereas in *Shainberg*, "a reasonable consumer [should] rely upon the manufacturer of the [defective] shoes . . . to the exclusion of the retail seller, Sam Shainberg Company of Jackson." *Id.*

sought a finding of inadequacy, as a matter of law, in the liability phase in the verdict.[46] Following long recognized precedent[47] in its analysis, the court recognized three primary issues.[48] As to whether Vicksburg Coke sold the carton, the court, disregarding Vicksburg Coke's suggestion,[49] in light of the evidence,[50] concluded that the alleged defective coke carton was one sold by Vicksburg Coke.[51] The court then addressed the question of whether "the carton was sufficiently defective to render it unreasonably dangerous."[52] Reviewing the

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[46] *Id.*

[47] *Id.* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975), stated:

> The established rule is that when the court considers whether the defendant is entitled to a judgment as a matter of law, the court should consider the evidence in the light most favorable to plaintiff, disregard any evidence on the part of defendant in conflict with that favorable to plaintiff, and if the evidence and reasonable inferences to be drawn therefrom would support a verdict for plaintiff, the jury verdict should not be disturbed.

Id. at 657 (quoting General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 105 (Miss. 1969)).

[48] *Reeves*, 486 So. 2d at 381. The three material issues were:

> (1) whether the carton from which the bottle fell was one sold, distributed and delivered to Traceway Shopette by Vicksburg Coke,
>
> (2) whether immediately prior to the accident there was a defect in the carton sufficient to render it unreasonably dangerous, and
>
> (3) whether immediately prior to the accident the carton was in substantially the same condition as when delivered by Vicksburg Coke to Traceway Shopette.

Id.

[49] *Id.* The court referred to Vicksburg Coke's suggestion that another customer may have brought the carton into the Shopette as "at best rank speculation and conjecture." *Id.*

[50] *Id.* It was not disputed that the bottle fell from a carton with characteristic Coca-Cola markings, nor that Vicksburg Coke held an exclusive franchise to market Coca-Cola in Claiborne County. *Id.*

[51] *Id.* The court concluded that it was certain to "at least 99 44/100ths percent that whatever Coke cartons were on the display shelves at Traceway Shopette had been furnished by Vicksburg Coke." *Id.*

[52] *Id.* The majority alluded to a lack of controversy concerning the unreasonably dangerous nature of a carton unable to sustain the pressures of lifting and holding the glass containers it was made to contain. *Id.* Vicksburg Coke relied strongly on the fact that the allegedly defective carton was not offered into evidence; however, the court concluded that "[w]hile production of the actual carton in evidence would have been desirable from the standpoint of all concerned, the condition of the carton is a matter certainly susceptible of proof by the testimony of eyewitnesses." *Id.*

In Powe v. Wagner Elec. Sales Corp., 589 F. Supp. 657 (S.D. Miss. 1984), the district court noted that the mere inability to produce the allegedly defective product did not in itself defeat the plaintiff's efforts because circumstantial evidence may be used to prove the required elements of the cause of action. *Id.* at 659; *see* Fruehauf Corp. v. Trustees of

evidence, the court found no testimony to suggest that the bottle emerged from the carton other than by "bursting through" the bottom.[53] Therefore, the court found legally sufficient proof to establish that the carton was defective so as to be unreasonably dangerous.[54] Finally, the court addressed the question of "whether the carton was in the same condition immediately prior to the accident as when it was delivered by Vicksburg Coke to Traceway."[55] From evidence of the minimum time the carton could have been in the store,[56] general assumptions of "normal use",[57] and the absence of a showing of abnormal use,[58] the court concluded the evidence was "sufficient to allow a reasonable juror to conclude that it was more probable than not that the carton immediately prior to the accident was in substantially the same condition as when it left the hands of Vicksburg Coke."[59]

Vicksburg Coke raised nine errors[60] covering jury instructions

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First United Methodist Church, 387 So. 2d 106, 110-11 (Miss. 1980)(reliance upon circumstantial evidence of defect in hydrolic nipple connector sufficient). However, where "the only proof is . . . grossly speculative," the allegedly defective product was not produced into evidence, and the plaintiff himself failed to preserve the product, the defendant may be placed in the unenviable position of defending a product without any method of identifying the alleged defect. *Powe*, 589 F. Supp. at 660-61.

[53] *Reeves*, 486 So. 2d at 381-82. Mrs. Smith testified that "*the Coke bottle fell through the bottom of the carton.*" *Id.* at 381 (emphasis in original). Similarly, Henry Banks, a Shopette employee, stated that "the bottom [of the carton] was out and the sides appeared to be torn a little." *Id.* at 382.

[54] *Id.* at 382. Reviewing the evidence in light of the *Paymaster Oil* rule, the court concluded that the evidence was legally sufficient to establish that the carton was unreasonably dangerous. *Id.*

[55] *Id.* The court noted as a condition precedent that the condition of the product was not substantially changed by Shopette. *Id.*

[56] *Id.* Vicksburg Coke made deliveries to Traceway Shopette on Wednesday and the accident occurred on Tuesday. *Id.* at 382-83.

[57] *Id.* at 383. The majority noted that transference of cartons from shelf to shelf by either store employees or customers should be considered normal use and a carton which was not sufficiently strong to withstand this reasonably anticipated movement would be defective so as to be unreasonably dangerous. *Id.* Moreover, normal handling "would not suggest change of condition." *Id.*

[58] *Id.* Absent proof of abnormal use, the court found an "overwhelming probability that any use to which the carton was put between the time it was delivered by Vicksburg Coke and the time of the accident was normal use, which the carton may reasonably have been expected to withstand without untoward consequence." *Id.*

[59] *Id.*

[60] *Id.* at 383-86. Prefacing the analysis of the defendant's specific allegations of error, the majority stressed the need to avoid repetitive theories of liability. *Id.* For example, the court stated that with the acceptance of § 402A, strong arguments may be made that "the breach of implied warranty theory of a products liability action should be relegated to the status of an important historical development in products liability law,

which were found, after reading all as a unit, to set out fully and accurately the law of strict liability in tort.[61]

Upon review of plaintiff's instruction number six,[62] the majority believed that the failure to delimit the parameters of the term "foreseeable misuse" constituted reversible error.[63] It is the general rule that an instruction must specifically define what act or omission would result in liability.[64]

In a strong dissent, Justice Walker questioned the majority's finding that the carton was defective.[65] By allowing such a finding from "not one scintilla of evidence," he accused the majority of supplanting the requirements of strict liability in tort[66] with those of res ipsa loquitur.[67] Moreover, Justice Walker stated that the majority's view, which

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wholly supplanted by strict liability in tort." *Id.* at 384. The first instruction analyzed was found to be simply a restatement of earlier instructions where the giving was "at worst harmless." *Id.* Noting that it is reversible error if an instruction is a definition of an abstract legal principle which had the "substantial probability" of construing or misleading the jury, the instant instructions, apparently taken from Ford Motor Co. v. Matthews, 291 So. 2d 169, 172 (Miss. 1974), defined key terms in the case. *Reeves*, 486 So. 2d at 384-85 (citing Nielson v. Miller, 259 So. 2d 702, 706 (Miss. 1972).

[61] *Reeves*, 486 So. 2d at 383-86.

[62] *Id.* at 386. In part, the instruction states that a seller is ". . . obligated not to sell a product that may become defective and unreasonably dangerous to the user of such product through a foreseeable misuse of such product unless adequate warnings are given to the user to prevent the foreseeable use." *Id.* at 387.

[63] *Id.* at 387. Citing Meridian City Lines v. Baker, 206 Miss. 58, 39 So. 2d 54 (1949), the court noted that the jury must be clearly informed as to the requirements of establishing liability. *Reeves*, 486 So. 2d at 387. *See* Jones v. Craft, 218 So. 2d 727, 729 (Miss. 1969)(inappropriate to allow jury to define what constituted "negligence").

[64] *Reeves*, 486 So. 2d at 388. With respect to the majority's reward upon the grounds of failure to define the term "misuse", Justice Robertson dissented. *Id.* at 391-92 (Robertson, J., dissenting). Justice Robertson noted that prior to attaching liability upon the manufacturer, the handling of the product *after* delivery to the retailer must be *foreseeable* whether defined as "use" or "misuse". *Id.* at 392 n.1 (emphasis in original). *See* Early-Gary, Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1975)(recovery conditional upon showing misuse or unusual use was foreseeable by manufacturer); Ford Motor Co. v. Matthews, 291 So. 2d 169, 174 (Miss. 1974)(standing on ground and starting tractor may be misuse, but if foreseeable by manufacturer may be basis of liability).

[65] *Reeves*, 486 So. 2d at 388 (Walker, J., dissenting).

[66] *Id.* at 388-89; *see supra* note 49 (three elements which must be established). Justice Walker stated there was no evidence that the carton was "defect[ive] . . . render[ing] it unreasonably dangerous at the time it left the hands of Vicksburg Coke." *Reeves*, 486 So. 2d at 388.

[67] *Reeves*, 486 So.2d at 389. Justice Walker viewed the majority as stating that "the happening of the event speaks for itself and would not have occurred in the absence of negligence or the exercise of due care by Coke of Vicksburg and thereby liability attaches." *Id.* Moreover, because the majority found that the use of the carton after it left

required the defendant to prove that the product was not defective, inappropriately shifted the burden of proof to the defendant.[68] Contrary to the majority, Justice Walker found that the decision in *Shainberg*[69] was a "premeditated decision rendered after a full and complete discussion by an intelligent court for the purpose of protecting retailers."[70] Justice Walker suggested that the proposal that the retailer, who is merely a conduit for products with latent defects, has an adequate remedy if he fails to fully appreciate the prohibitive cost of litigating that right.[71]

II. Voluntary Intoxication and its Effect on Recovery

A. *Adult, Voluntary Inebriates Outside Protected Class Envisioned by Mississippi Code Section 67-1-83*

In *Cuevas v. Royal D'Iberville Hotel*,[72] the Mississippi Supreme Court strictly defined the class of persons protected under section 67-1-83 of the Mississippi Code by excluding from protection those adults who voluntarily become inebriated.[73] On November 12, 1981, Catherine

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Vicksburg Coke's hands to be "normal use", Justice Walker stated that the court inappropriately shifted "the burden onto Coke of Vicksburg to prove that the carton was misused." *Id.* From "this *mountain of lack of evidence*," in Justice Walker's view, the majority held a reasonable juror could infer that the carton "was in substantially the same condition as when it left the hands of Coke of Vicksburg." *Id.* (emphasis in original).

[68] *Id.* Justice Walker concluded that the majority apparently abrogated the requirements of *Early-Gary* and now requires the defendant to negate defectiveness. *Id.*

Concluding by their very nature that glass, and other popular containers, will on occasion fail in their intended purpose, Justice Walker dissented from the finding that the product was unreasonably dangerous. *Id.* at 391. Justice Walker stated that by allowing recovery for the failure of the cardboard carton, it should logically follow as appropriate recovery from the seller for merely selling his product in glass containers. *Id.* In Justice Walker's view, recognizing that the law has placed the manufacturer in the shoes of an insurer, violence would not be done to the language. *Id.*

[69] *See supra* notes 40-45 and accompanying text.

[70] *Reeves*, 486 So. 2d at 390. Quoting *Shainberg*, Justice Walker noted that it was inappropriate to require a retailer to inspect for latent defects or be subjected to liability, because to do so in effect makes retailers insurers. *Id.*

[71] *Id.*

[72] 498 So. 2d 346 (Miss. 1986).

[73] *Id.* at 348-49. The relevant statute states:

> . . . [i]t shall be unlawful for any permittee or other person to sell or furnish any alcoholic beverage to any person who is known to be insane or mentally defective, or to any person who is visibly intoxicated, or to any person who is known to habitually drink alcoholic beverages to excess, or to any person who is known to be an habitual user of narcotics or other habit-forming drugs.

Oakes Cuevas fell over the railing of the Royal D'Iberville Hotel after consuming intoxicants in the hotel bar.[74] Cuevas alleged that the hotel violated section 67-1-83 by serving alcohol to her when she was in a visibly intoxicated state.[75]

After a discussion of general considerations of negligence *per se*,[76] the court, distinguishing *Munford, Inc. v. Peterson*,[77] affirmed summary judgment for the hotel.[78] In *Munford*, the court held a seller of alcohol to a minor, in violation of section 67-3-53(b), accountable for injuries received by third parties resulting from the minor's intoxication.[79] The *Munford* court found the "protected class" to be the general public, and Peterson, a minor, was a member of that class.[80] Although the *Munford* court found a seller of alcohol to a minor negligent *per se* and liable for injuries to the general public, adults or

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MISS. CODE ANN. § 67-1-83(1)(Supp. 1986). Sanctions for violation of § 67-1-83 consist of a fine of not more than five hundred dollars and/or not more than a six month term in the county jail. *Id.* at § 67-1-83(4). Moreover, the violator's license shall be revoked for violation of the section. *Id. But cf.* Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985)(social host who serves alcohol to visibly intoxicated social guest not liable to those injured in automobile accident involving guest).

[74] *Cuevas*, 498 So. 2d at 347. While at a medical technician's convention, Cuevas fell over a railing which was about eight inches below the height required by building codes. *Id.*

[75] *Id.*

[76] *Id.* at 347-48. Quoting W. PROSSER, THE LAW OF TORTS § 36 (4th ed. 1971), the court stated the general consideration in negligence *per se*. *Cuevas*, 498 So. 2d at 347. Being careful not to invade the province of the legislature by creating civil duties from criminal statutes and ordinances, Prosser noted that in some statutes the legislature has intended to limit a class of civilly protected persons and in other statutes intended to protect all those persons injured by violation. PROSSER, *supra*, at 192, 194-95.

[77] 368 So. 2d 213 (Miss. 1979).

[78] *Cuevas*, 498 So. 2d at 349.

[79] *Munford*, 368 So. 2d at 217. On May 28, 1975, Scott Peterson and four friends, all of whom were under eighteen years old, purchased beer on three separate occasions from the Majic Market (owned by Munford, Inc.). *Id.* at 214-15. About four o'clock in the morning, one of the boys, Tommy Blankenship, was driving west on Highway 90 when "he lost control of the vehicle, crossed the median and south lanes of the highway, hit the seawall . . . turned over five (5) times . . ." during which Peterson was thrown from the car which rolled over and fatally injured him. *Id.* at 215. The court found that Munford's employee had violated Mississippi's prohibition on selling alcohol to minors. MISS. CODE ANN. § 67-3-53(b) (1972). The court noted that the class of persons protected by the statute was the general public. *Munford*, 368 So. 2d at 216. The *Munford* court stated that when a statute is violated, the injured party is entitled to an instruction that the party violating the statute is guilty of negligence, and, if that negligence proximately caused or contributed to the injury, then the injured party is entitled to recover. *Id.* at 217.

[80] *Munford*, 368 So. 2d at 216.

minors, the *Cuevas* court distinguished the present case by concluding that it was not the legislature's intent to hold liable a seller of alcohol to an adult "who voluntarily consumes intoxicants and then, by reason of his inebriated condition, injures himself."[81]

In a strongly worded dissent, Justice Robertson questioned the majority's reliance on an unpublished legislative history and the validity of "legislative intent" in general.[82] Rather than base statutory interpretation on such "intent", Justice Robertson felt that the court should construe the statute in a manner which best fits present needs, i.e., reducing alcohol related injuries.[83] In view of the inadequacies of present criminal sanctions,[84] Justice Robertson expressed the opinion that the tort system should be the vehicle by which the desired social result may be effected.[85] Finding "no rational basis" upon which the majority's bifurcation of the general public into protected and non-protected classes[86] and no legislative history for guidance,[87] Justice Robertson concluded that the mere voluntary consumption of intoxicants does not remove one from the protection of the law.[88] Justice Robertson found that the facts in *Cuevas* suggested that the plaintiff "voluntarily and knowingly placed herself in a position of potential danger and . . . should [have been] charged in law with the appreciation of the fact that injury to herself was likely to occur as a consequence."[89]

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[81] *Cuevas*, 498 So. 2d at 348-49. Citing Smith v. State, 445 So. 2d 227 (Miss. 1984), the court found analogous with its present holding, the general rule in criminal law that voluntary intoxication is no defense to the commission of unlawful acts. *Cuevas*, 498 So. 2d at 348 n.2.

[82] *Cuevas*, 498 So. 2d at 357 (Robertson, J., dissenting).

[83] *Id.* at 358.

[84] *Id.* Justice Robertson concluded that the limited fine and jail time coupled with the "vague[ness] of the wording of § 67-1-83 (4)" makes "effective deterrence via criminal enforcement . . . wholly impracticable." *Id.*

[85] *Id.* Although potentially a greater threat, license revocation has not been sufficient to control alcohol related accidents, and therefore, the tort system would appear the better alternative to insure compliance with § 67-1-83(1). *Id.*

[86] *Id.* at 359. In Justice Robertson's view, § 67-1-83 does not address the issues of a protected class, "much less delineate any such class." *Id.*

[87] *Id.* Justice Robertson noted "[t]he traditional 'what did the legislators (founding fathers) mean' approach to statutory construction has been demolished in DWORKIN, LAW'S EMPIRE 317-37 (1986), so effectively that it should never again be taken seriously." *Cuevas*, 498 So. 2d at 359 n.11. *See supra* note 82 and accompanying text.

[88] *Cuevas*, 498 So. 2d at 360. *See* Dickerson v. State, 441 So. 2d 536, 538 (Miss. 1983)(laws of state protect "saints as well as sinners").

[89] *Cuevas*, 498 So. 2d at 360. The historical view that "the plaintiff's injury is caused by her drinking and not by the bartender . . ." has been rejected as "obsolete fiction." *Id.* at 362 n.14; *see* Ewing v. Cloverleaf Bowl, 143 Cal. Rptr. 13, 19, 572 P.2d 1155, 1160 (1978)(stating disapproval of "the obsolete proximate cause fiction").

However, Justice Robertson noted that assumption of risk was not pleaded by the defendant Royal D'Iberville, and therefore was waived.[90]

Partially relying on cases from other jurisdictions, Justice Dan Lee dissented noting that an intoxicated person is as entitled to the protection of the law as a sober one.[91] Justice Dan Lee agreed with the argument that a violation of section 67-1-83(1) of the Mississippi Code by a seller of alcohol was negligence *per se* if the intoxicated party was within the class of persons protected by the statute and the injury was of the type protected against.[92] Justice Lee concluded that if Cuevas' injuries were proximately caused by the violation of section 67-1-83(1), the granting of summary judgment was in error.[93]

B. Contributory Negligence of Passenger in Intoxicated Driver's Car

In *Hill v. Dunaway*,[94] the Mississippi Supreme Court concluded that a jury "may" find a plaintiff negligent by voluntarily being a passenger in an automobile driven by a drunken driver.[95] Plaintiff John Steve Hill was a passenger in an automobile driven by James Dunaway.[96] Evidence showed that both passenger and driver had consumed a fairly large quantity of alcohol, and Dunaway admitted being "under the influence", dozing off, and running off the road prior to the accident.[97] The plaintiff appealed a jury award of $50,000.00[98] alleging that

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[90] *Cuevas*, 498 So. 2d at 362. *See* Miss. R. Civ. P. 8(c)(1986).

[91] *Cuevas*, 498 So. 2d at 352-54 (Dan Lee, J., dissenting). *See* Christiansen v. Campbell, 328 S.E.2d 351, 354 (S.C. 1985)(one purpose of statute prohibiting sale of alcohol to intoxicated person was to protect that person from further intoxication and greater potential injury); Selchert v. Lien, 371 N.W.2d 791, 792-93 (S.D. 1985)(one who knowingly serves intoxicants to one highly intoxicated is liable for his death because inebriant is within class of protected persons).

[92] *Cuevas*, 498 So. 2d at 354.

[93] *Id.*

[94] 487 So. 2d 807 (Miss. 1986).

[95] *Id.* at 809; *accord* Swift v. State Farm Mutual Auto Ins. Co., 796 F.2d 120, 124 (5th Cir. 1986)(Louisiana law bars recovery to passenger who agrees to ride in car where driver is intoxicated, intoxication causes accident, passenger knew or should have known of driver's condition).

[96] *Hill*, 487 So. 2d at 808. Hill and Dunaway set out for the Mississippi Gulf Coast "to see the sun rise". *Id.* Evidence showed that Hill was riding in the right front seat. *Id.*

[97] *Id.* Some testimony was presented that Dunaway had not consumed any alcohol during the hour immediately proceeding the accident; however, the court found evidence that Dunaway had dozed off several minutes before the accident and thus, a credible inference that Hill knew or should have known that Dunaway's driving ability was impaired either by lack of sleep or consumption of alcohol was justified. *Id.*

the jury inappropriately reduced the award according to a comparative negligence theory.[99]

The Mississippi Supreme Court found that the trial court had correctly stated the law and the verdict was supported by the evidence.[100] The court stated that if the jury found that under the circumstances the plaintiff failed to exercise reasonable care for his own safety, then they could find him guilty of negligence and if this negligence contributed to his injuries, his recovery should be proportionately reduced.[101] The court reasoned that "[it] is both common sense and common law that one who rides with a driver who has been drinking extensively and

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[98] *Id.* Hill suffered severe injury to his right leg which required several surgical procedures involving medical and hospital expenses of $30,782.61. Moreover, Hill established lost wages of $10,660. *Id.*

[99] *Id.* Hill submitted that the only explanation for the gross inadequacy of the award was the inappropriate consideration of the defense attorney's argument that Hill himself was negligent. *Id.* The text of the allegedly offered instruction stated:

> The court instructs the jury that if you find from a preponderance of the evidence in this case that the plaintiff [Hill] and the defendant [Dunaway] left Jackson, Mississippi, at approximately 9:30 or 10:00 p.m. on the evening of the accident, and began drinking beer while traveling, and that the plaintiff Hill bought a six-pack of beer, which the plaintiff and the defendant consumed between Jackson and Hattiesburg, and that in Hattiesburg, the plaintiff and defendant purchased another six-pack of beer and continued to drink beer and drive south on Highway 49, and that the parties arrived at the Mississippi Gulf Coast, and then decided to drive toward New Orleans, and that you find from the preponderance of the evidence, if any, that under the circumstances, the plaintiff failed to exercise ordinary and reasonable care for his own safety, then you may find that the plaintiff was guilty of negligence. And if you further find that the plaintiff's negligence, if any, proximately contributed to his own injury, then you must, under the law reduce any award you might otherwise render for the plaintiff by the proportion of the causal negligence you attribute to the plaintiff under the circumstances.

Id. at 808-09.

[100] *Id.* at 809. Hill's contention that the instruction "was contrary to the weight of the evidence" missed the operative point of law concerning the scope of proper instruction; namely, where there exists credible evidence in the record of a genuine issue of material fact (here the plaintiffs alleged contributory negligence) the jury is entitled to be instructed on that fact. *Id. See* Odier v. Sumrall, 353 So. 2d 1370, 1374 (Miss. 1978)(where plaintiff admitted he failed to look back before attempting to seat himself after defendant moved chair, adequate grounds for contributory negligence instruction existed); Cotton v. Quinn, 245 So. 2d 593, 594 (Miss. 1971)(proof sufficient to establish prima facie issue of unavoidable accident warranted jury instruction on issue).

[101] *Hill*, 498 So. 2d at 809. Hill strove to convince the court that his acts or omissions contributed nothing to the accident; however, such effort failed to address the central aspect of the contributory negligence issue, i.e., "[whether] Hill's acts or omissions contributed to his *injuries* and resultant *damages* not whether they caused the car to run off the road." *Id.* at 809-10 (emphasis in original).

who has become sleepy may be found to be acting without reasonable care for his safety."[102] Moreover, although the affirmative defense of assumption of the risk is available, it in no way precludes the operation of contributory negligence.[103]

III. Invasion of Privacy

In *Candebat v. Flanagan*,[104] the court determined that recovery in an invasion of privacy action is not conditioned upon a showing of injury to a pecuniary or proprietary interest.[105] In 1977, James Candebat purchased a hospitalization policy from the National Motorist Association (NMA).[106] After an automobile accident for which NMA paid the Candebats' claims,[107] the Candebats began to receive unsolicited communications concerning their NMA claim.[108] Subsequently, the Candebats learned that NMA was using information about their claim in the NMA sales kit.[109] The trial court granted NMA's motion for a directed verdict in the Candebats' suit for invasion of privacy.[110]

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[102] *Id.* at 810.

[103] *Id.* In Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947), a passenger was killed in an automobile driven by an intoxicated driver and the court held that the driver had a complete defense, assumption of risk, against the wrongful death suit. *Id.* at 821, 29 So. 2d at 648. *Saxton* concluded that the mere fact that the passenger himself was voluntarily intoxicated did not defeat the defense assumption of risk "unless he himself was so drunk that he was unable to comprehend what he saw and heard . . . ." *Id.* at 825, 29 So. at 649.

Although there is a trend toward the elimintation of the strictness of the theory of assumption of risk in favor of a contributory negligence standard, the Mississippi Supreme Court noted that such movement demonstrates that assumption of risk is merely one method of addressing the plaintiff's negligence. *Hill*, 487 So. 2d at 810 n.1.

[104] 487 So. 2d 207 (Miss. 1986).

[105] *Id.* at 212; *see* Fairfield v. American Photocopy Equip. Co., 291 P.2d 194, 197 (Cal. Ct. App. 1955)(mental, subjective injury basis for cause of action of invasion of privacy rather than proprietary interest).

[106] *Candebat*, 487 So. 2d at 208. National Motorist Association, a Mississippi corporation, offered various road services and hospitalization plans, and in November of 1977 James Candebat joined the Association. *Id.*

[107] *Id.* In December, 1977, Mrs. Candebat suffered serious injuries requiring several months of hospitalization when an intoxicated driver ran head on into the Candebat automobile. *Id.*

[108] *Id.* A few months after Mrs. Candebat's hospitalization, Mr. Candebat began receiving inquiries from friends and strangers concerning both his wife's accident and NMA benefits. *Id.*

[109] *Id.*

[110] *Id.* at 209. In December, 1979, Candebat filed suit against NMA and its officers alleging "invasion of privacy through the appropriation of their names for commercial purposes without their consent." *Id.* The trial court found that Candebat's showing of

The Mississippi Supreme Court reversed and remanded, holding that a claim for "invasion of privacy" consists of four sub-torts.[111] The Candebats' complaint, however, failed to recognize the distinctive elements of each of the four sub-torts[112] and, thereby, possessed internal inconsistency.[113] The importance of correctly defining the sub-tort for which the plaintiff sued became apparent with the element of the requisite showing of damages.[114] For example, in *Fairfield v. American*

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damages, "deep distress at knowing that the details of their personal tragedy had been divulged to strangers [and Mrs. Candebat's fear of] remaining in her house alone," failed to meet the requisite showing of damages caused by NMA's conduct and hence, directed a verdict for the defendants. *Id.*

[111] *Id.* In Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 473 (Miss. 1976), the Mississippi court recognized the four sub-torts of invasion of privacy as delineated by Prosser:

1. The intentional intrusion upon the solitude or seclusion of another;
2. The appropriation of another's identity for an unpermitted use;
3. The public disclosure of private facts; and
4. Holding another to the public eye in a false light.

Candebat, 487 So. 2d at 209.

[112] *Candebat*, 487 So. 2d at 209. Candebat referred to the alleged invasion as an intrusion on solitude; however, the court noted that by alleging this invasion rather than "commercial appropriation", the plaintiff would have to meet the heavier burden of showing a substantial interference with solitude, the kind which "would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652 (b) comment d (1977)); *see also* Wilson v. Retail Credit Co., 325 F. Supp. 460, 467 (S.D. Miss. 1971)(requirement of malice or reckless disregard for truth in invasion of privacy justified by business necessity of intrusion into personal affairs in preparation and communication of credit reports).

[113] *Candebat*, 487 So. 2d at 210. The court interpreted the allegation in the Candebat complaint that, "[NMA and other defendants] either caused to be or did appropriate the names of Mr. James Candebat, Sr. and Mrs. Irene Candebat for the commercial advantage of the corporate defendant . . . to further the mercantile goals of aggrandize and enrich [said] defendant . . . without the knowledge or express consent of the Candebats," as an "appropriation of the identity of the plaintiffs without their consent." *Id.*

[114] *Id.* Two schools of thought exist as to the requisite showing of damages, *viz.*, courts which focus on the proprietary measure of damages where the plaintiff may receive only "the value of what is lost" and courts which dismiss the proprietary requirements. *Id.*

From the first school is Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. Ct. App. 1966), where a female stripper's photograph was used in an advertisement for a night club at which she had not performed. *Id.* at 504. The Georgia court characterized the invasion as "commercial exploitation" which required a showing of special damages unlike an invasion by disclosure of private facts or false light, which did not. *Id.* at 504; *see also* Hamilton v. Crown Life Ins. Co., 423 P. 2d 771, 772 (Or. 1967)(recovery denied absent showing of appropriation of "commercial value").

Photocopy Equipment Co.,[115] a California court held that the injury in an invasion of privacy action is mental and subjective rather than pecuniary or proprietary.[116] Likewise, the *Restatement* incorporated this line of thought stating that "one who has established a cause of action for invasion of his privacy is entitled to recover damages for . . . his mental distress proved to have been suffered if it is a kind that normally resulted from such an invasion."[117] The Mississippi Supreme Court found the *Restatement* and *Fairfield* approach preferable to the strict property interest approach because of the non-pecuniary damages that resulted from each invasion.[118]

The second school of thought recognizes the existence of injury from invasion of privacy other than an affront to proprietary interest. *Candebat*, 487 So. 2d at 212. *See* RESTATEMENT (SECOND) OF TORTS § 652W (1977); *see also* Billings v. Atkinson, 498 S.W. 2d 858, 860 (Tex. 1973)(without showing actual physical injury, plaintiff may recover damages for mental suffering resulting from unauthorized wire tap); Olan Mills of Texas, Inc. v. Dodd, 353 S.W.2d 22, 24 (Tex. 1962)(evidence of humiliation, embarrassment, mental anguish, loss of weight from worry, lack of sleep, sufficient showing of damages to base recovery for unauthorized use of plaintiff's photograph).

[115] 291 P.2d 194 (Cal. Ct. App. 1955).

[116] *Id.* at 197.

[117] RESTATEMENT (SECOND) TORTS § 652H (1977).

[118] *Candebat*, 487 So. 2d at 212. Recognizing that an invasion of privacy may cause severe emotional injury and little commercial injury, the Mississippi Supreme Court refused to "focus with tunnel vision" on proprietary injury requirements. *Id.*

COMMENTS

INDIVIDUAL RIGHTS AND GROUP WRONGS: AN ALTERNATIVE APPROACH TO AFFIRMATIVE ACTION

It borders on axiomatic to state that blacks and women are second class citizens in American society. This premise is borne out by statistical evidence which reflects that both blacks[1] and women[2] are situated at the lowest rungs of America's economic ladder. Commenting on the relationship between the sexes during her day, nineteenth century abolitionist and feminist Sarah Grimke remarked, "I ask no favor for my sex . . . all I ask of our brethren is that they take their feet off our

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[1] Black family income is slightly more than half that of whites. Fallon and Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 33 (citing CURRENT POPULATION REPORTS, SERIES P-60, MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES 166 (1982)). Since passage of Title VII of the Civil Rights Act of 1964, black unemployment rates are consistently double those of whites. Fallon and Weiler, *supra* at 33, n.145 (citing ECONOMIC REPORT OF THE PRESIDENT 259 (1984)). Moreover these statistics hide the phenomena of discouraged blacks who have ceased to seek employment. *See* CENTER FOR THE STUDY OF SOCIAL POLICY, A DREAM DEFERRED: THE ECONOMIC STATUS OF BLACK AMERICANS 19 (1983)(black male nonparticipation rate increased 28 percent from 1960 to 1982). For an historical perspective which explains the origin of these disparities, *see generally*, Prince, *Discrimination Against Blacks in Education: An Historical Perspective*, in SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 161 (1977).

[2] Women are the victims of both job segregation and under-compensation payment. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 524 n.80 (1982). On the average women earn sixty cents for every dollar earned by men. *Only Limited Economic Progress Made by Women in Past Decade, Report Says*, 983 GOV'T EMPL. REL. (BNA) 27 (Oct. 11, 1982). Eighty percent of women workers are found in only twenty of the four hundred twenty seven occupations listed by the Census Bureau. Ledger, *City, County and State Government Liability for Sex-Based Wage Discrimination*, 17 URB. LAW 229, 230 (1985). These statistics have given rise to the theory of comparable worth. *Id.*

necks."[3] While the origin, nature and effect of discrimination directed at women differs significantly from the discrimination that confronts blacks, Grimke's statement aptly applies to both groups today.[4]

Any change in this artificial hierarchy wrought from the repression of blacks and women necessitates the loss of a secure berth for the average white male. Thus far, affirmative action represents America's best effort to affect any structural change and in doing so this remedy has become surrounded in controversy.

Affirmative action's detractors tend to view it as being, at best, a favor granted minorities[5] by white males[6] or at worst, as reverse dis-

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[3] GINSBURG, REALIZING ONE EQUITY PRINCIPLE IN SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 135 (1977).

[4] These differences have been explicated in a variety of ways, but they fall into two primary categories: environmental and biological. First, due to environmental differences in terms of education and integration into the majority culture, non-minority women are better equipped to compete than black women since white girls go to school with their brothers. K. GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 35 (1983). As a result, white women can move more easily into slots in the work force and in professional schools. GINSBURG, *supra* note 3, at 136-37 (nonminority females do not suffer from ghettoization). Secondly, the biological fact of child bearing (as distinguished from child rearing) will always exist. In contrast, the legal and societal discrimination against blacks will disappear in the color blind utopia. *See* Williams, *Equalities Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326-28 (1985)(discussion of pregnancy viewed in terms of permanent handicap); *cf.* Powers, *The Shifting Parameters of Affirmative Action: "Pragmatic" Paternalism in Sex-Based Employment Discrimination Cases*, 26 WAYNE L. REV. 1281, 1282-83 (1980)(posits emerging trend toward pragmatic paternalism which exempts women for biological reasons from certain employment positions, purportedly to protect employers and their clients from risks presented by women occupying these positions). Despite these differences, discrimination against women and blacks has the same effect of undermining their ability to compete. While blacks are usually subject to a series of interlocking privations, women are psychologically hindered by the absence of role models and the restriction of social mores which spill over into the workplace. *See* Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159, 165 (1975)(reverse discrimination justified as it neutralizes competitive disadvantages of person's environment as well as past privations). For the purposes of a general discussion of affirmative action, sex and race share three crucial characteristics: first, members of the subordinate group are easily identifiable; second, membership in the inferior group is initially non-volitional; and third, once acquired, this membership cannot be renounced. Johnson and Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 739 (1971).

[5] As used in this paper, the term minorities is inclusive of both women and racial groups. The scope of this paper does not permit discussion of the issue of which groups deserve affirmative action. For a detailed and valuable discussion of criteria of preferment, *see* D. MAGUIRE, A NEW AMERICAN JUSTICE 128-68 (1980).

[6] *See generally*, D. MAGUIRE, *supra* note 5, at 28-29 (affirmative action seen as attempt by white males to prevent recurrence of discrimination).

crimination which punishes white sons for the sins of their fathers.[7] The assumption that lies at the root of both these views is that white males hold a special entitlement to entry in the best schools and to careers in the most lucrative and prestigious fields.[8] This assumption is reinforced by the way Americans think about justice as it relates to the distribution of resources such as education and employment. Traditional American thinking about justice is highly individualistic and therefore does not readily accept group based remedies like affirmative action. The true tragedy springing from this reluctance is that it has resulted in a permanent underclass[9] which will persist so long as our idea of justice does not welcome group remedies.

In this comment it will be argued that utility and fairness demand that our view of justice be broadened to include both justice for persons suffering individual wrongs and justice based on group membership. The need for this enlightened view will be demonstrated through a discussion of current legal thought and caselaw. Finally, the inadequacies of the philosophical premises most commonly offered in support of affirmative action will be analyzed.

The Systemic Reality

The justice of any system which allocates rights and resources can be measured by a variety of yardsticks. Individualism is deeply rooted in the American legal system thus, in American legal thought, this yardstick has been the individual. A result of this fixation with the individual is that such recent innovations as the class action suit are utilized merely as an efficient means of administering justice[10] instead

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[7] Duncan, *supra* note 2, at 533. The Supreme Court has rejected this argument. Sheet Metal Worker's v. EEOC, 106 S. Ct. 3019, 3053 n.50 (1986)(contention that Title VII visited sins of other's past discrimination upon white persons was rejected as without merit).

[8] Duncan, *supra* 2, at 534. Opponents of affirmative action argue that it deprives white males of their rightful job positions. *Id.* However, as Duncan correctly points out, white males must first be entitled to the positions in order to be deprived of them. *Id.* Since affirmative action operates only at the entry or promotional level, it does not divest white males of what is rightfully theirs. *Id.* For an analogous argument, *see* Sadurski, *The Morality of Preferential Treatment: the Competing Jurisprudential and Moral Arguments*, 14 Melb. U.L. Rev. 572, 597 (1984)(preferential admissions violates no one's rights, because no person has intrinsic right to become student).

[9] Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 Harv. C.R.-C.L. L. Rev. 599, 610 (1979). For blacks and women denied full membership in the community, nothing can make amends better than a job which brings money and self respect. D. Maguire, *supra* note 6, at 109.

[10] *See generally*, Horowitz, *supra* note 9, at 610 (views legal system as being geared

of being used as a means of protecting the rights of groups having historical identities outside of the courtroom. As it exists presently, the American system of justice strips the individual of any status other than that of a litigant seeking compensation for a particular wrong perpetrated against him. As a consequence Americans do not:

> encourage judges to focus on the burdens, stigmas and scars produced by history. Rather each individual comes to court robbed of the special attributes of group membership, and hence denied the opportunity to say to society at large: "You owe me something as a fellow member of society, because you and your ancestors once deprived my people of their dignity and thus have scarred us all." Deprived of a group identity by a legal system that addresses only violations of individual rights, the minority plaintiff can raise no claim as a result of the injustices heaped on his ancestors and, through them, on him. The history and culture of oppression, transmitted through legally anonymous generations, is made antiseptic when each individual is treated as a separate being, disconnected from history.[11]

This individualism carries great weight in a climate where civil rights, which so often involve group rights, are subject to considerable criticism. The individualist concept of justice is exemplified not only by American case law[12] but also by the pronouncements of those entrusted with enforcing the law, such as William Bradford Reynolds, Assistant Attorney General for Civil Rights, who has stated:

> We are all . . . a minority in this country: a minority of one. Our rights derive from the uniquely American belief in the primacy of the individual. And in no instance should an individual's rights rise any higher or fall any lower than the rights of others because of race, gender, or ethnic origin . . . any compromise of this principle is discrimination . . . and such behavior is no more tolerable when employed remedially, in the

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toward redressing individual grievances rather than vindicating group rights). The comments to the federal rule providing for class actions focus primarily on the existence *vel non* of the group's identity in court and the rule's enhancement of efficiency and judicial economy. FED. R. CIV. P. 23.

[11] Horowitz, *supra* note 9, at 610.

[12] *See infra* notes 35-39 and accompanying text. In EEOC v. Local 638, 532 F.2d 821, 827 (2d Cir. 1976), the court of appeals stated that "reverse discrimination contradicts our basic assumption that individuals are to be judged as individuals, not as particular racial groups."

name of "affirmative action" or "racial balance".[13]

In the context of litigation stemming from race and sex discrimination, America's individualistic concept of justice places the burden on the victim to realize that he has a legally compensable grievance, hire and pay an attorney and then proceed through the lengthy and expensive process of a lawsuit. Although it is possible for a prevailing litigant to obtain attorney's fees in some cases[14] or for the government to prosecute the case on behalf of the victim,[15] the systemic reality is that the litigant stands alone. However, the very fact that the litigant stands alone flies in the face of any realistic understanding of the nature of discrimination. Insidious discrimination is founded upon erroneous stereotypes which are used to deny a person a wide range of social benefits and resources for no other reason than membership in a certain group.[16] For example, the employer who does not hire mothers

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[13] Reynolds, *Individualism Versus Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1003 (1984).

[14] 42 U.S.C. § 1988 (1979) allows recovery of attorney's fees by the plaintiff if he prevails in a 42 U.S.C. §§ 1981, 1983 or 1985 action. *See e.g.*, Maine v. Thiboutot, 448 U.S. 1, 10 (1980)(attorney's fees awarded to prevailing party under 42 U.S.C. § 1988 in § 1983 action). Attorney's fees can also be awarded under 28 U.S.C. § 2412(d)(1)(a) if the action was brought by or against the United States unless the government's position is found by the court to be substantially justified. *See e.g.*, Berman v. Schweiker, 713 F.2d 1290, 1299 (7th Cir. 1983)(attorney's fees awarded to plaintiff in social security case under 28 U.S.C. § 2412(d) where government's position was not substantially justified). Additionally, Title VII allows the court in its discretion to award attorney's fees to the prevailing party under § 706(k). *See e.g.*, United States v. Terminal Transport Co., 653 F.2d 1016, 1022 (5th Cir. 1981)(attorney's fees awarded to prevailing party under 42 U.S.C. § 2000e-5K). Thus, the plaintiff, if he sues under Title VII risks having to pay not only his attorney but the defendant's also. *See Terminal Transport*, 653 F.2d at 1022 (where plaintiff fails to prevail in any respect, court may at its discretion award attorneys' fees to defendant).

[15] Title VII of the Civil Rights Act of 1964 § 707, 42 U.S.C. § 2000e-6(a) allows the attorney general's office to bring a civil action against state and local government employers whenever it has reason to believe that any person or group is engaged in a pattern or practice of discrimination. *See, e.g.*, United States v. Fresno Unified School Dist., 592 F.2d 1088, 1096 (9th Cir. 1979)(allowed Attorney General to initiate pattern or practice discrimination suit against school district).

[16] Johnson and Knapp, *supra* note 4, at 738-39. These authors offer the following construct to illustrate the operation of race and sex stereotypes:

> Analytically, state-enforced sex discrimination is virtually identical to racial discrimination in at least three significant ways: (1) each reflects a group stereotype based on imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many individual members of the group; (2) each provides governmental endorsement for the opinion privately held by members of a dominant group that, due to the supposed existence of these characteris-

with small children, but hires similarly situated fathers,[17] looks at women as a group and decides that every woman who is a mother of small children is either incapable of working and raising children or that her husband is unwilling to raise children. From a purely common sense perspective, it seems unreasonable to use individual forays to attack the rigid class structure which is bolstered by such discrimination. Such behavior bears more resemblance to an attempt to shoot down a jet fighter with a pea-shooter than a concentrated effort to end discrimination.

This highly individualized approach to justice also gives short shrift to an essential aspect of human beings as social creatures who live in an interdependent society.[18] Scholars and jurists grappling with the application of affirmative action in the context of an individualistic legal system have in effect been trying to force a square peg into a round hole. This conceptual failure along with the need for a systemic change which would accommodate group remedies can be seen by examining the works of legal philosophers and the opinions of the United States Supreme Court.

John Rawls in his influential A THEORY OF JUSTICE,[19] speaks in abstract terms and therefore does not address specific issues like affirmative action. However, Rawls' solution to the problem of social justice rests on the idea that we are social creatures whose actions affect those with whom we live.[20] While cast in a variety of forms throughout the book, Rawls' theory is founded on two principles of justice which can be easily summarized. First, "each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for

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tics, each member of the subordinate group is inherently inferior; and (3) proceeding from the assumption that the stereotypes are accurate, each attempts to confirm and perpetuate the existence of the supposed characteristics by requiring every citizen to conform to a variety of rules, all of which reflect the belief that one group is in fact inferior to another.

Id.

[17] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971)(female applicant with pre-school-age child was wrongfully denied employment while similarly situated men were hired).

[18] There is an unfortunate tendency, especially in the area of affirmative action, to think in zero-sum terms, whereby cumulative gains are seen to equal cumulative losses. D. MAGUIRE, *supra* note 5, at 94. The error of this view is especially clear in light of the utilitarian theory supporting affirmative action. *See infra* notes 90-101; *see also* Hart and Sachs, *infra* note 64 (goal of any society is to expand pie).

[19] J. RAWLS, A THEORY OF JUSTICE (1971).

[20] *Id.* at 4.

others."[21] Second, "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit to the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[22] It would be a strained reading of Rawls to claim that his emphasis on the benefit to the least advantaged placed him among the proponents of affirmative action but, nonetheless, his concept of justice recognizes that choices, as to what is just, are made in the context of society as a whole.

A similar recognition is made by Daniel Maguire in his work A NEW AMERICAN JUSTICE[23] in which he argues that persons, either collectively or individually, relate to individuals in three different ways making it necessary that justice take on three forms which reflect these relations.[24] First, since individuals relate to other individuals in a one-on-one fashion, then there must necessarily be an individual form of justice to govern these situations.[25] Secondly, individuals relate to the social whole. This relationship necessitates a form of justice which Maguire labels social justice.[26] Finally, the social whole, through its representatives, relates to individuals thereby making necessary a form of justice which Maguire labels distributive justice.[27] Maguire empha-

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[21] *Id.* at 60.

[22] *Id.* An additional point is relevant to an understanding of Rawls' theory. He posits a veil of ignorance where men in the original position bargain as to the structure of a just society with only these two principles to guide them. *Id.* at 137-39. In the veil of ignorance persons do not know their color or wealth or sex or intelligence or opinions in the society to be established. *Id.* at 137. Thus, they must anticipate that they could be on either the bottom or the top of the heap. *Id.* at 139.

[23] D. MAGUIRE, *supra* note 5. Abraham Edel presents a similar concept though he fails to develop it. *See* Edel, *Preferential Considerations and Justice*, in SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 111 (1977). Edel synopsizes the rights versus goods debate and proposes that instead of thinking in terms of opposing theories, the reader should think of two models, the individual rights model and the collective welfare model, and ask in which of the areas of social life is it desirable to use one model or the other. *Id.* at 115. He cautiously endorses collective rights as the correct model for affirmative action. *Id.* at 116.

[24] D. MAGUIRE, *supra* note 5, at 67. Maguire operates from the explicitly stated premise that human life is a shared life. *Id.* at 76.

[25] *Id.* at 67. Maguire refers to this form of justice as "individual justice". *Id.* at 68. It is basically simple in its concept as it only requires justice between the parties who are interacting with each other. *Id.* Therefore, if A steals B's lawn mower, A owes B a lawn mower's worth of restitution, but the neighbor down the street is in no way implicated. *Id.*

[26] *Id.* at 67. Social justice involves individual's debts to society and the common good. *Id.* This requires that every citizen contribute toward creating a society in which respect and hope are present for all. *Id.*

[27] *Id.* at 67-68. Distributive justice refers to the way in which the benefits and evils

sizes that these forms of justice are not mutually exclusive. Moreover he recognizes his three forms of justice are merely the means by which overall justice is realized.[28]

However, the usefulness of the Maguire method is limited. The method's utility lies in that it labels the forms of justice with which a society ought to concern itself.[29] For example, Maguire's forms of social and distributive justice, which involve sufficient sharing among society's members to accord individuals their due to meet their essential needs,[30] in effect form the basis of affirmative action. But it's usefulness ends there. This stems largely from the fact that affirmative action is an unusual hybrid of philosophical approach and social policy. Given its unique nature, any workable rationale for affirmative action must necessarily focus on how, when and to what extent affirmative action should apply, a focus Maguire's spectrum of forms does not entail.

In their analysis of the United States Supreme Court decision in *Firefighters v. Stotts*,[31] Richard Fallon and Paul Weiler noted this same infirmity of thought. What these authors found reflected in the *Stotts* decision was that those justices in the majority endorsed individual justice while those justices comprising the minority championed group justice.[32] Although they do not endorse without constraint the standard group based remedy used in affirmative action, Fallon and Weiler recognize that America's pervasive history of racism requires a "rectification" to eliminate the systemic discrimination which has led to the economic deprivation of blacks.[33] Moreover, Fallon and Weiler

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of society are distributed among individuals. *Id.* at 68. Maguire contrasts distributive justice against social justice, although both relate to the common good. *Id.* Collecting taxes is an example of distributive justice, yet paying taxes is an act of social justice. *Id.*

[28] *Id.* at 66-67. Maguire states "[j]ustice does not admit of partitioning. Failure at any form of justice is injustice." *Id.* at 67.

[29] *See supra* notes 25, 26, 27 and accompanying text.

[30] D. MAGUIRE, *supra* note 5, at 83. Essential needs are defined as those without which self respect and hope could not endure. *Id.* at 62. These needs do not rise to the level of rights unless the neglect of a need would effectively deny the human worth of the needy. *Id.* at 65. Maguire argues groups now entitled to preferential treatment have had their worth as human beings destroyed through denial of their essential needs. *Id.*

[31] 467 U.S. 561 (1984).

[32] Fallon and Weiler, *supra* note 1, at 10. Fallon and Weiler concluded that, bifurcated into individual and group approaches, judicial readings of Title VII as well as the equal protection clause of the fourteenth amendment are colored by the surrounding moral debate. *Id.* at 10-11.

[33] *Id.* at 30-31. They see a tension between the traditional individual justice model, which allows for compensation only where one has been personally harmed, and the group justice model, which views discrimination as a wrong against a group and favors

recognize that racial discrimination as exists today is so pervasive that individualistic approaches to justice are insufficient to correctly respond to the problem.[34]

An analysis of the United States Supreme Court decisions on affirmative action also demonstrates the inadequacy of a highly individualistic approach to justice. Beginning with *Regents of the University of California v. Bakke*,[35] the Court gave a backhanded endorsement to affirmative action by recognizing group rights and the need for, and valid use of, the preferential treatment of minorities.[36] Justice Powell, writing for the majority, objected to a California medical school's admission policy because it established a quota system under which several slots were reserved solely for minority applicants.[37] Rather, the Court, by way of comparison, looked favorably upon a plan used by Harvard University under which all applicants competed for all available openings in an upcoming class, but race was used as a positive factor when considering individual applicants.[38] Thus, while Bakke won his position in medical school, the opponents of affirmative action were dealt a set-back because the Court recognized that race could operate as a positive factor in the admissions process.[39]

This recognition of group rights, was continued in *Steelworkers v. Webber*[40] and in *Fullilove v. Klutnick*.[41] *Webber* involved a temporary

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group remedies. *Id.* at 28. The model of social justice described by the commentators purports to offer some middle ground. *Id.* at 30.

[34] *Id.* at 27. The authors not only feel that the individual justice model is inadequate to improve the economic status of minority groups and to eliminate devisive racial structures, but they also feel that, given the extent of racial discrimination in American history, the individual justice model is morally inadequate. *Id.* at 26-27.

[35] 438 U.S. 265 (1978).

[36] *Id.* at 320. The Court's decision in *Bakke* is not surprising in view of its earlier decision in Franks v. Bowman Transport Co., 424 U.S. 747 (1976). In *Franks*, the Court awarded black employees retroactive seniority status which had the effect of placing them at a higher level on the seniority ladder than those whites employed before them. *Id.* at 774-75. Writing for the Court, Justice Brennan noted that in the absence of the seniority remedy, the relief would have been inadequate since the goal was to place the victims where they would have been had they been hired at the time of their applications. *Id.* at 764-66.

[37] *Bakke*, 438 U.S. at 320. The Court stated that such a plan which specifically reserved slots for minorities was flawed not because race was a consideration, but because the plan denied white applicants their right to individual considerations. *Id.* at 318-20.

[38] *Bakke*, 438 U.S. at 317-18. The difference, though of importance to Justice Powell, amounts to little in terms of the actual impact of the plans. In both schools, individual consideration without regard to race is not possible. *See* D. MAGUIRE, *supra* note 5, at 43-44.

[39] *Bakke*, 438 U.S. at 317; *see also* D. MAGUIRE, *supra* note 5, at 39-44.

[40] 443 U.S. 193 (1979).

affirmative action program which was self-imposed by a private employer.[42] In upholding such a program, the United States Supreme Court focused on the voluntary nature of the program and also noted that the plan did not absolutely bar whites nor had it resulted in the discharge of any white employees.[43] In *Fullilove*, the Court was faced with a governmentally imposed affirmative action program.[44] In this case adversely affected plaintiffs mounted a constitutional challenge to the minority business set-aside provisions of the Public Works Employment Act of 1977.[45] In rejecting this claim the Court expressly noted that a sharing of the burden of affirmative action by innocent parties was permissible when the remedy was narrowly drawn to cure the effects of prior discrimination.[46]

Prior to *Firefighters v. Stotts*, the Court appeared to endorse voluntary affirmative action plans where whites as a group were not entirely excluded from the receipt of benefits.[47] In *Stotts*, a federal district court granted an injunction which modified a consent decree entered into as a resolution of a Title VII suit against the City of Memphis, Tennessee.[48] The injunction forbade layoffs based strictly on

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[41] 448 U.S. 448 (1980).

[42] *Webber*, 443 U.S. at 197. The program resulted from collective bargaining by an employee union and reserved 50% of the openings in a craft training program until such time as the percentage of black craftworkers in the plant equalled the percentage of blacks in the local labor force. *Id.*

[43] *Id.* at 208. In the opinion of the Court the program fell within the area of discretion left by Title VII to the private sector to voluntarily adopt affirmative action plans in order to correct conspicuous racial imbalances in traditionally segregated jobs. *Id.* at 209. Comparing the program in question to Title VII itself, the Court stated that both were structured to give Blacks employment opportunities in occupations traditionally closed to them. *Id.* at 208.

[44] *Fullilove*, 448 U.S. at 453-56. This litigation focused on a provision in the Public Works Employment Act of 1977, 91 STAT. 116 (1977)(codified as amended at 42 U.S.C.A. § 701-6736 (West 1983)), which set aside 10% of federal funds granted for local public works projects for businesses owned and controlled by minority group members. *Fullilove*, 448 U.S. at 453-54. For purposes of this provision, a business had to be at least 50% owned by minority group members, defined as "citizens of the United States who are Negroes, Spanish speaking, Oriental, Indians, Eskimos, and Aleuts." *Id.* at 454.

[45] *Id.* at 455.

[46] *Id.* at 484-85. The Court stressed that although they may assume the complaining parties are innocent of any discriminatory conduct, Congress had the power to pass this legislation on the assumption that these parties have reaped a competitive benefit over the years from the exclusion of minority firms. *Id.* at 485.

[47] *See supra* notes 35-40, 42-43 and accompanying text.

[48] *Stotts*, 467 U.S. at 565-66. The original suit was brought as a class action by Carl Stotts, a black holding the position of captain in the Memphis Fire Department. *Id.* at 565. In order to remedy the department's hiring and promotion practices, the parties

seniority since this would result in the undoing of the preferential hiring plan, which had been established by the consent decree.[49] While the United States Supreme Court decision was limited to reviewing the district court's power to modify the consent decree, there was some gratuitous language by Justice White as to the affirmative action remedy under Title VII.[50] Indeed it can be argued that *Stotts* is not an affirmative action case at all and that Justice White's language on Title VII is merely dicta.[51] This appears to be the position adopted by several lower federal courts which have declined to read *Stotts* as an affirmative action case.[52] However, these contentions aside, what is relevant here is that *Stotts* represents a schism between members of the Court on the issue of group justice[53] when the result is the loss of benefits to whites as a class. The *Stotts* decision demonstrates the Court's confusion over how to apply group remedies in a legal culture receptive only to individuals stripped of any historical or group identity. In this light, the split on the Court, as to the appropriateness of the affirmative action remedy, mirrors the ideological split in American society as to whether justice is a group concept, an individual concept or both.

Nonetheless, the Justice Department has argued that the Court's holding in *Stotts* precluded imposition of an affirmative action plan absent a showing that the beneficiaries of the plan were actual victims of discrimination.[54] This argument has been soundly rejected by the Supreme Court as evidenced by the Court's upholding four of the last

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entered into a consent decree under which the city agreed to increase the proportion of minority representation in each job category to approximate the proportion of blacks in the local labor force. *Id.*

[49] *Id.* at 567. The original layoffs were a part of a city-wide reduction of nonessential personnel and were based on a "last-hired, first-fired" rule. *Id.* at 566. In order to comply with the injunction, some nonminority employees with more seniority than minority employees were laid off or demoted in rank. *Id.* at 567.

[50] *Id.* at 477-81. *See infra* note 72.

[51] Fallon & Weiler, *supra* note 1, at 10.

[52] *See* Britton v. South Bend Community School Corp., 775 F.2d 794, 808 (7th Cir. 1985), *reh'g granted*, 783 F.2d 105 (1986)(in essence *Stotts* concerns district court's power to amend consent decree); Deveraux v. Geary, 765 F.2d 268, 272-74 (1st Cir. 1981), *cert. denied*, 106 S. Ct. 3337 (1986)(collects cases where courts declined to follow *Stotts* on Title VII).

[53] Fallon & Weiler, *supra* note 1, at 28.

[54] *See, e.g.*, Local 28 Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3048 (1986). In *Local 28*, the Justice Department argued that under *Stotts* and section 706(g) of Title VII, affirmative action relief is limited to actual victims of discrimination. *Id.* at 3048. The Court stated that none of the decisions cited by the Justice Department for that proposition suggested that individual "make whole" relief was the only kind of remedy available under Title VII. *Id.* at 3048-49.

five affirmative action plans presented to it.[55] The Supreme Court has supported affirmative action in contexts ranging from employer created plans,[56] to consent decrees,[57] and court ordered plans.[58] Consistent with *Stotts*, however, the Court has held that affirmative action in the context of a layoff is not permissible.[59] Though this overall support is heartening for proponents of affirmative action, the Court, in the post-*Stotts* decisions, has broken little new ground. With the exception of the holding in *Johnson v. Santa Clara County*,[60] that an employer need not have a history of intentional discrimination to rationalize its self-imposed affirmative action plan,[61] the Court has for the most part limited the application of affirmative action to those areas already covered by pre-*Stotts* caselaw.[62]

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[55] The only case rejecting affirmative action was Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986). In *Wygant*, the local school board and the teachers' union agreed to a provision in the collective bargaining agreement which protected minority employees against layoffs. *Id.* at 1844-45. When layoffs became necessary, minority teachers who had less seniority were retained over tenured nonminority teachers who were laid off. The layoff provision was upheld by the district court and the court of appeals. *Id.* at 1845. In a fractured decision overruling the lower courts, the Supreme Court wrote that it had "never held that societal discrimination alone is sufficient to justify a racial classification." *Id.* at 1848. A few months later, *Wygant* was distinguished from a case where affirmative action was upheld on the basis that affirmative action at the entry level, rather than the seniority level, was less burdensome to individual whites. *Local 28*, 106 S. Ct. at 3053.

[56] *See* Johnson v. Santa Clara County, 107 S. Ct. 1442, 1449 (1987)(manifest imbalance in traditionally segregated job categories allows employer to adopt plan taking sex or race into account).

[57] *See* Local 93, Int'l Assn. of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3075 (1986)(Title VII does not restrict ability of employers or unions to enter into a consent decree providing race-conscious relief).

[58] *See* United Sates v. Paradise, 107 S. Ct. 1053, 1073 (1987)(court order temporarily required 50 percent of state trooper promotions to go to blacks); Local 28 Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3048 (1986)(court ordered labor union to take steps to eliminate racial discrimination).

[59] *See supra* note 55.

[60] 107 S. Ct. 1442 (1987).

[61] *Johnson*, 107 S. Ct. at 1454.

[62] *Id.* at 1452. *Johnson* emphasizes the voluntariness of the employer's affirmative action plan as per *Webber*. *Johnson*, 107 S. Ct. at 1452; *see also supra* notes 40, 42-43 and accompanying text. Similarly, Local 93, Int'l Ass'n. of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3072 (1986) relied on *Webber*. *Johnson* even harkens back to *Bakke* for the idea that race or sex may be a plus factor. *Johnson*, 107 S. Ct. at 1455; *see also supra* notes 35-39 and accompanying text.

The Challenge of Conceptual Change

The faltering and often contradictory reasoning utilized by the United States Supreme Court in the cases discussed above lends support to the premise that the individualistic idea of justice is not sufficient when addressing discrimination based on group stereotypes.[63] Whether one is comfortable with the idea or not, courts make law in a manner distinguishable only in form from the manner in which legislatures make law.[64] The social reality of the mechanics of discrimination against group members demands that judges, lawyers and policymakers acknowledge the inadequacies of individual justice in addressing the problems posed by pervasive and insidious discrimination.

However, the mere acknowledgement of the inadequacies of individual justice is not enough. Scholars and jurists confronted with this inadequacy have readily affixed labels to the problem but have failed to offer any solutions.[65] What is required is a standard for separating those cases where individual justice is sufficient from cases where it is not sufficient. In the latter circumstances the alternative application of group justice would enable the litigant to be viewed in the context of the burdens, scars and stigmas accumulated over the course of history. Group justice, that is the consideration by courts of the historic and economic context of a problem, is appropriate in cases where the plaintiff can demonstrate the inadequacies of individual justice. In addition to establishing that the application of individual justice would deny him a remedy, a plaintiff should also be required to show that the wrong suffered by him happens more often than not to members of his group and that he has suffered this wrong primarily because of his membership in the disadvantaged group.[66]

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[63] *See supra* notes 35-62 and accompanying text. Note Justice Powell's statement that societal discrimination against groups is "an amorphous concept that might be ageless in its reach into the past" appears in the same opinion which later endorses race as a factor in admissions decisions. *Bakke*, 438 U.S. at 307.

[64] *See generally*, H. Hart & A. Sachs, The Legal Process (1958)(unpublished manuscript).

[65] *See supra* notes 18-30 and accompanying text.

[66] The 1982 amendments to § 2 of the Voting Rights Act of 1965 provide a conceptually analogous standard to the proposed for application here in a broader context. *See* 42 U.S.C. § 1973 (Supp. 1987). The senate report on the proposed amendments list the following factors for courts to consider in § 2 cases: retention of any history of official discrimination in the state or political subdivision which touched on the minority group's right to vote; racial polarization within the state; extent of use of voting practices which enhance the opportunity for discrimination; denial of minority group's access to candidate stating process; extent to which minorities bear effects of discrimination in education, employment and health which hinders their ability to participate in the political

The application of this standard provides a demarcation for cases where justice requires more than can be delivered by a system of individual justice. Basically, group justice entails a less myopic view of the relationship between the victims of discrimination and its perpetrators. In such situations, the less legalistic and more contextual our thinking, the more just will be the result.

Inadequate Philosophical Underpinnings

The two primary rationales for affirmative action, the compensation theory,[67] and the utilitarian theory,[68] mirror the current tension between individual and group justice. Of these two, the compensation rationale is the theory most often offered in support of affirmative action and as such will be the initial focus of this discussion.

The compensation rationale contemplates the redistribution of the resources of a society which tolerates an unequal extension of opportunity and an unequal distribution of rewards.[69] Simply put, this theory provides that because minorities have suffered the hindrances and barriers of discrimination in the past, then the present descendants of these minorities deserve to be compensated for the injuries suffered by their forbearers. This compensation takes the form of preferential treatment, the logic being that these descendants would be in their rightful places today had it not been for the past discrimination perpetrated by the majority.

Compensation fits at least superficially with our notions of legal redress, that is, making whole the victim and punishing the wrongdoer. While numerous courts have used a compensation rationale to justify affirmative action,[70] even when those required to give compensation are

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process; overt or subtle racial appeals in political campaigns; extent to which minority members have been elected to political office. S. Rep. No. 417, 97th Cong., 2d Sess. 16, 28-29, reprinted in 1982 U.S. Code Cong. & Ad. News 177, 206-07. Use of these factors under § 2 has been held to be constitutional. *See* Johns v. City of Lubbock; 727 F.2d 364, 372-75 (5th Cir. 1984)("section 2 devises a standard for determining whether an electoral system, in light of its contemporary effects and historical context, discriminates").

[67] Sadurski, *supra* note 8, at 576; *see infra* notes 69-89 and accompanying text.

[68] Duncan, *supra* note 2, at 524; *see supra* notes 90-101 and accompanying text. In *Bakke*, three of the four purposes offered by the University of California at Davis to support the minority set-aside program had their foundations in the social utility theory. *Bakke*, 438 U.S. at 306.

[69] Banner, *Compensatory Justice and the Meaning of Equity*, in Social Justice and Preferential Treatment 199, 208 (1977).

[70] *See, e.g.*, Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 173 (6th Cir. 1983). There the Court of Appeals for the Sixth Circuit noted:

It is clear that members of the majority can be required to bear some of the

considered by the court to be innocent,[71] the rationale also serves as a basis for the most persuasive criticism of affirmative action. The compensatory rationale can be turned on its head and be used as a rationale for the denial of group based remedies.[72]

Compensation provides the most ammunition for affirmative action's critics because in traditional lawsuits courts usually compensate only where an identifiable wrongdoer is found guilty of a specific act which results in an injury to a plaintiff.[73] But reverse discrimination, as affirmative action is called by its critics, does not fit this standard compensatory model because it involves compensation between indeterminable classes of persons as opposed to compensatory actions between individuals.[74] In addition reverse discrimination does not require that the wrongful injury be committed by the party obligated to pay the compensation.[75]

These special traits of affirmative action parallel the two general

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> burden which inevitably results from the affirmative efforts to rectify past discrimination. Even if it is assumed that the plaintiffs in this action are innocent of discriminatory conduct themselves, they are a part of a group which did reap competitive benefit from past discriminatory practices.

Id. Other courts have used multi-part tests to determine whether affirmative action is acceptable. These tests usually require some finding of past discrimination and emphasize that the plans must be remedial in nature because they are temporary. *See, e.g.*, South Florida Chapter of Ass'd Gen. Contractors v. Dade County 723 F.2d 846, 851-52 (11th Cir.) (affirmative action requires finding that government body is remedying present effects of past discrimination), *cert. denied*, 469 U.S. 871 (1984); Valentine v. Smith, 654 F.2d 503, 510 (8th Cir.)(plan must last only so long as necessary to achieve its goals), *cert. denied*, 454 U.S. 1124 (1981).

[71] *See* Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 438 (1980). "It is reasonable for some persons innocent of wrongdoing to bear some of the burden in order to correct the harsh effects of a grievous wrong of constitutional dimensions . . . ." *Id.*

[72] The point that the compensatory theory can be used to deny group based relief is illustrated by Justice White's words in *Stotts*, "[m]ere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him." *Stotts*, 467 U.S. at 579 (dicta); *see also* Goldman, *Affirmative Action*, 5 PHIL. & PUB. AFF. 178, 188-89 (1976)(reverse discrimination justifiable as compensation only for those who can show actual discrimination against them as individuals).

[73] PROSSER AND KEETON ON TORTS 20-23 (W. Keeton 5th ed. 1984).

[74] Blackstone, *Reverse Discrimination and Compensatory Justice*, 3 SOC. THEORY & PRAC. 253, 255 (1975); *see also* K. GREENAWALT, *supra* note 4, at 52-53. In the context of gender based discrimination, one critic argues that compensatory policies are particularly inappropriate because men have a history of discrimination commensurate with that suffered by women. Kanowitz, *Benign Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379, 1429-31 (1980).

[75] Blackstone, *supra* note 74, at 255.

categories into which criticisms of affirmative action, as compensation, can be divided. The first criticism concerns itself with the party to be compensated and the second with the party to bear the cost of compensation. The crux of the former argument is that race or sex as a category of compensation is overinclusive in that it benefits those who need no help.[76] Some proponents of affirmative action concede the point that some recipients of preferential treatment might not need it because of advantages of wealth or family but add that it would not be administratively feasible to develop narrower categories.[77] Other proponents cite the words of Justice Thurgood Marshall in his separate opinion in *Bakke*: "It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, have managed to escape the impact . . . ."[78] Both of these responses to the overinclusiveness criticism overlook an important factor. In cases where criteria such as grades and test scores are used for selection, there is also a degree of self-elimination from preferred group status by those members of minorities who are capable of meeting the criteria without race or sex as a positive factor. It is this same class of persons who need no preferential treatment and who succeed without preferential treatment for whom affirmative action is said to be overinclusive.[79]

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[76] Nickel, *Preferential Polices in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 538 (1975).

[77] *Id.* at 538. An extension of this over-inclusive argument is that the competent minorities will be stigmatized because, correctly or not, the majority perceives them as being able to succeed only with special assistance. This would make sense if most minority leaders objected to affirmative action, but they do not. *See* Sadurski, *supra* note 8, at 579. Minority support for affirmative action, coupled with the greater stigma which results from the under representation of minorities in the professions, make the stigma arguments unpersuasive. *Id.* at 578-79. Some also claim that minorities themselves feel inferior because of affirmative action. However, the psychological evidence does not support this claim. *See* Nacoste, *Selection Procedure and Response to Affirmative Action: The Case of Favorable Treatment*, 9 LAW & HUMAN BEHAV. 225, 226 (1985)(preferential treatment does not harm self image of its beneficiaries).

[78] *See, e.g.*, Duncan, *supra* note 2, at 517 (quoting *Bakke*, 438 U.S. at 400 (Marshall, J., separate opinion)). A compelling point is, if a minority applicant has done a superior job of overcoming obstacles created by race, then is he any less deserving of compensation? *See* Boxhill, *The Morality of Preferential Hiring*, 7 PHIL. & PUB. AFF. 246, 247-48 (1978)(preferential hiring benefits all members of minority groups).

[79] Boxhill, *supra* note 78, at 247. Another somewhat strained and little used argument in race based affirmative action is that affirmative action would lead to unwieldy ancestry checks for those who claim preferential treatment because they have some "black" blood. Maguire, *supra* note 5, at 151-52. This argument is illogical. If a goal of

The second argument is that those who are required to pay compensation, usually the white males currently competing for the educational or economic positions, are the ones least likely to have perpetrated or benefited from past discrimination.[80] As mentioned earlier, this argument not only involves a presumption that these white males are entitled to these positions,[81] but also assumes a natural and inevitable equation between merit, as traditionally measured, and desert.

The most effective counter to the presumption of entitlement is that the presumption itself works a greater injustice on present generations of minorities than does requiring white males, who may or may not have benefited from past discrimination, to bear the cost of this discrimination.[82] There is no "moral absurdity" in having to choose between bad and worse. For as one scholar has put it:

> It is an unfortunate truth about the human condition that we do not always make choices between good and bad, but often between degrees of bad. There is nothing morally absurd about situations where we have to infringe one moral principle in order to save another: when, for example, we prefer to lie in order to diminish someone's suffering. The allegedly morally absurd situation reflects the tragedy of human life in which conflicts of values are part of our world and in which to act morally often means to choose the lesser evil. The same applies to the realm of justice. Not always do we have the luxury of choice of an absolutely just solution against an unjust one; sometimes a just act consists in choice of a less unjust

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affirmative action is to create role models, one must only be perceived as black to be a beneficiary. *Id.* at 152.

[80] Boxhill, *supra* note 78, at 246; *see* Alexander v. Bahou, 86 F.R.D. 194, 200 (N.D.N.Y. 1980)(Supreme Court prohibits remedies affecting easily identifiable group of whites because small numbers of individuals should not be forced to forfeit reasonable expectations to correct social injustices which they had no part in creating); *see also* D. Maguire, *supra* note 5, at 55-56 (portrait of victim of reverse discrimination).

[81] *See supra* note 8 and accompanying text.

[82] *See supra* note 70. Ruth Bader Ginsberg quotes Susan Brownmiller's wry commentary about the mediocre man as the one who will suffer the pinch of affirmative action:

> No longer will he be assured a comfortable berth . . . . He stands to be displaced . . . by top flight women on their way up and he will be under assault from equally mediocre women who are perhaps a shade more aggressive or sociable or better connected. Mediocre women have a right to equal treatment too.

N.I.L. Ginsburg, *supra* note 3, at 142 (quoting Brownmiller, MBA Magazine, March 1971).

solution.[83]

In addition to the point that moral choices are not made in a vacuum, the so-called "victims" of reverse discrimination are not necessarily the wrong persons to bear the burdens of affirmative action. First, though white males may not have individually wronged women and blacks, they have profited by wrongs done to those groups by the community.[84] Second, preferential treatment makes an unfair system fairer by refusing to allow white males to exercise their advantage over minorities.[85]

Another aspect of the presumption of entitlement is that it assumes that merit equals desert.[86] It can be argued that the inequality of advantage which results in disparity of qualification belies a flaw in a fundamental feature of the system.[87] Differences in merit are not great enough to justify the wide differences in rewards.[88] Desert can and should be overridden by liberty and efficiency. At the root of the

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[83] Sadurski, *supra* note 8, at 597. Duncan argues in an analogous vein that "[w]hites fail to acknowledge, however, that the ongoing discrimination, of which they are beneficiaries, is a 'but for' result of that 'prior injustice'." Duncan, *supra* note 2, at 538-39.

[84] Boxhill, *supra* note 78, at 263.

[85] *Id.* at 266. This is the argument that due to disparities in standards of living, "equal opportunity" is a myth.

[86] One issue in the debate over affirmative action is whether the traditional criteria of merit for selection are so inherently faulty that they should not be used at all. That issue is beyond the scope of this paper, but for a general discussion *see* Wasserstom, *The University and Preferential Treatment*, SOCIAL JUSTICE AND PREFERENTIAL TREATMENT 20, 21-22 (qualifications are customary, conventional and designed by white males, so it is not surprising that they do better) and Sadurski, *supra* note 8 at 599 (above basic level of qualifications so student can benefit from education, differences between less qualified and more qualified make little difference in educational ability); *see generally*, Fallon, *To Each According to His Ability From None According to His Race: Merit in the Law of Anti-Discrimination*, 60 B.U.L. REV. 815, 842 (1980)(argues for conception of merit which encompasses social values); Maguire, *supra* note 5, at 172-74 (merit may arise due to deserving individual or due to common goal of society).

However, it is argued that merit systems may allocate wealth by using irrelevant criterion, thereby undercutting distributive justice where benefits are allocated on irelevant grounds of merit. Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 374 (1973). An argument similar in spirit to Nagel's is made by Sher that the goal of affirmative action should be neutralizing present competitive disadvantages which are born of past deprivations in nutrition, housing and schooling. Sher, *supra* note 4, at 163. Since the ability to compete on equal terms is a lost good, the most appropriate method of substituting what has been lost is to remove the necessity of competing on equal terms. *Id.* Sher's argument, though it does not deal with merit as such, is related to it.

[87] Nagel, *supra* note 86, at 352-53.

[88] *Id.* at 354.

problem is our social system of rewards because this system falsely assumes that the benefits of professional status necessarily lead to economic standing. Other values must and should come into play in a social system of rewards.[89] When one couples these arguments with the issue of how merit is determined, one realizes that the progression from merit to desert is not inevitable or even socially useful.

This merges into the second theory which is often offered to support affirmative action, the utility rationale. Utilitarianism is a misnomer in the context of preferential treatment since the term brings to mind Bentham's criterion of the greatest good for the greatest number.[90] Affirmative action is often viewed as a sacrifice by the majority for the minority's benefit. The concept presently under consideration is broader than that and presents fewer justificational problems than the compensatory theory.[91]

As a matter of social utility, preferential treatment is often the only means of interrupting a cycle of disadvantage.[92] It is on this intangible level that benefits, such as a greater social harmony, are viewed as the advantages resulting from a more equal society.[93] On a less esoteric level, the generally recognized advantages include increasing the number of minority role models, increasing diversity in university student bodies, and improving services to the minority community.[94] Benefits also accrue to the society as a whole. Economic benefits extend to all citizens as minorities move into higher paying jobs[95] and employers have a wider pool of talent from which to draw.[96] Indeed Maguire argues that affirmative action could be sold to American business through the profit motive.[97] This argument, utilitarian in nature though not denominated as such, is that as the economic status of mi-

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[89] *Id.* at 355-57.

[90] Duncan, *supra* note 2, at 524-25.

[91] *Id.* at 524.

[92] Sadurski, *supra* note 8 at 576.

[93] *Id.*

[94] Duncan, *supra* note 2 at 525. In *Bakke*, the Court approached the minority set aside issue from a compensatory perspective, *Bakke* 438 U.S. at 306, apparently ignoring social utility as a basis for any opinion. One can only speculate as to whether the result would have been different if the Court had used a utilitarian approach.

[95] Duncan, *supra* note 2, at 528. This is analogous to intervention in the economy through minimum wage laws which are justified on utilitarian grounds. Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39, 55-56 (1974).

[96] Duncan, *supra* note 2, at 528.

[97] D. MAGUIRE, *supra* note 5, at 108-10. Maguire also notes current cost to the economy in terms of welfare, crimes, and unemployment. *Id.* at 109.

norities increase, so will their buying power.[98] Finally, it is argued that a predominately white male leadership in government and business lacks the breadth of perspective to address the problems of a new, qualitatively different world.[99] As a workable theory, utility makes an appealing case. Not only is it subject to fewer criticisms than the compensatory theory,[100] it can be made palatable on the basis of self-interest. Moreover it makes sense, an attribute which much of the affirmative action debate lacks.[101]

Conclusion

When one accepts that justice in its social or group form can and should coexist with individualized justice, affirmative action becomes more than a utilitarian solution to a complex social problem. In terms of the result, it makes little difference whether the majority chooses to discriminate against itself[102] out of self-interest or out of a social concept of justice.[103] But for those concerned about the moral growth of our society, the latter motivation is the only one.

Lindsey Patterson

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[98] *Id.* at 110-11.

[99] Ginger, *Who Needs Affirmative Action*, 14 Harv. C.R.-C.L. L. Rev. 265, 271 (1979). The author offers as an example: a housing project for families with small children which was placed far from any area where children could safely play. The project was dynamited as a total failure. *Id.* at 270-71. Had women or single parents been involved with planning, this fatal flaw could have been avoided. *Id.* at 271.

[100] *See supra* notes 69-89 and accompanying text. The primary criticism of the utilitarian approach is that it runs against its own grain by allowing the hiring and advancement of those who are incompetent and who will drain the economy. Duncan, *supra* note 2, at 529. This criticism is a straw man largely because it can be alleviated by setting minimum levels of competence so that a preferred applicant is qualified to benefit from the program. Moreover, no good utilitarian would advocate incompetence. Finally, preferences at the entry level of a hiring program or college do not assume that the employer or institution should award promotions or diplomas without the person having earned them. No supporter of affirmative action would argue for preferential award of medical degrees to those who had not met the criteria for graduation. This relates back to merit. *See supra* note 85.

[101] *See, e.g.*, Flanagan v. President of Georgetown College, 417 F. Supp. 377, 384 (D.D.C. 1976)("affirmative action may be justified provided . . . it is administered on a racially neutral basis").

[102] J.H. Ely, Democracy and Distrust 172 (1980).

[103] *See supra* notes 83-85 and accompanying text.

RELEVANCE OF STATE OF THE ART EVIDENCE IN DESIGN DEFECT ACTIONS UNDER SECTION 402A

TOLIVER V. GENERAL MOTORS CORP.: A PORTENT OF MORE ABSOLUTE LIABILITY FOR DEFENDANTS IN MISSISSIPPI

I. Introduction

The 1985 landmark opinion of the Mississippi Supreme Court in *Toliver v. General Motors Corp.*[1] has dual significance in the products liability litigation arena. Of primary importance is the holding of the court which placed Mississippi decisional law in line with that of other states through recognition of the liability of an automobile manufacturer for "second impact" injuries caused by a defective condition in his product.[2] But of equal significance to the state bar is the import of extensive dicta in the opinion addressed to evidentiary matters in design defect cases.[3] The apparent inconsistencies in the language of the court regarding the relevancy of state of the art evidence give rise to uncertainty and speculation from a defense perspective concerning the Mississippi position on this point in defective design actions brought under the strict liability in tort theory of *Restatement (Second) of Torts* section 402A.[4]

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[1] 482 So. 2d 213 (Miss. 1985)(en banc)(opinion modified on denial of rehearing, February 12, 1986).

[2] 482 So. 2d at 214. In *Toliver*, the court specifically overruled Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969), the genesis of the second impact doctrine in Mississippi, and the cases subsequently based on *Walton*. *Toliver*, 482 So. 2d at 214. The *Toliver* court was persuaded that the issue of causation should focus on the instrumentality causing the enhanced injury rather than on that which caused the initial collision. *Id.* Toliver was critically burned, following a rear-end collision, when gasoline from his erupted gas tank spilled into the passenger compartment and ignited. *Id.* at 213.

[3] *Toliver*, 482 So. 2d at 216-18.

[4] Briefly stated, the inconsistent positions in *Toliver* impacting on the relevance of state of the art evidence under a section 402A theory of liability are: (1) the statement that a risk-utility analysis of product defectiveness is meaningless under strict liability law, (2) rejection of Dean Wade's advocacy of a negligence standard rather than one of strict liability for design defects, (3) expansion of the plaintiff's burden of proof to include the right to introduce evidence of non-conformity with industry standards and of feasibility of an alternative design, and (4) in conjunction with defendant's right to offer evidence in rebuttal, a reference to the new *Mississippi Rules of Evidence* 401 and 402 which have the effect of relaxing and broadening the scope of admissibility of all relevant

However, the current confusion regarding admissibility of defendant's state of the art evidence in section 402A design defect cases is not unique to Mississippi. Confusion on a national level stems from the interplay of two factors. First, no uniformity exists among jurisdictions as to 1) the definition of state of the art evidence, 2) the concept of defectiveness, 3) the underlying policy considerations for implementation of strict liability in tort, or 4) the burdens of proof placed on the plaintiff and defendant. Second, the approach taken by a single jurisdiction in each of these four areas affects the ultimate position of that court on the relevance of state of the art evidence in section 402A actions.[5]

This comment will discuss the multiplicity of approaches in these areas espoused by other courts and will review Mississippi products liability decisions to determine the opposite Mississippi positions. This review will include both Mississippi cases decided since the 1966 adoption by the supreme court of section 402A in *State Stove Manufacturing Co. v. Hodges*[6] and federal district court and Fifth Circuit Court of Appeals product liability decisions applying Mississippi law.[7] In connection with the Mississippi position in these four areas, the comment will discuss the effects of those positions on evidentiary matters under section 402A prior to *Toliver*, juxtaposing them against the inconsis-

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evidence. *Id.* at 218 & n.2. The conceptual inconsistency between the first two positions and the latter two will be explored in a later portion of this comment. *See infra* notes 122-141 and accompanying text.

Mississippi adopted the language of § 402A in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967). Section 402A states:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[5] Spradley, *Defensive Use of State of the Art Evidence in Strict Products Liability*, 67 MINN. L. REV. 343, 343-44 (1982).

[6] 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[7] The state and federal court cases reviewed are those annotated under products liability in the *Mississippi Digest* (Supp. 1986) and those published in the Mississippi Supreme Court advance sheets from 1985 up to September 1986.

tencies of *Toliver* which make it unclear whether the court will impose a more absolute liability in the future by deeming defendant's state of the art evidence irrelevant in design defect actions. Finally, it will examine approaches to the admissibility of state of the art evidence in other jurisdictions holding positions similar to Mississippi, pointing out possible solutions for the Mississippi court by which it could adopt these approaches under its existing strict liability principles and recognize the concepts of reasonableness inherent in section 402A without undermining the equitable balance in strict liability between plaintiff and defendant.

II. Four Factors Which Influence Admissibility of State of the Art Evidence Under Section 402A

A. Definitions of State of the Art

Since the term "state of the art" first appeared in a products liability context over thirty years ago,[8] it has been employed in judicial opinions with four distinct definitions: scientific-technological knowledge, feasibility, industry custom or standards, and government standards.[9] The first and narrowest definition, which is espoused by Frumer and Friedman, limits the term to "the level of pertinent scientific and technological knowledge existing at the time."[10] These authors further explain their definition as an inquiry into whether or not all meaningful knowledge of design and engineering had been utilized in the design process of the product. "Meaningful knowledge" incorporates all applicable data from every industry, discipline and research laboratory which is published and available in technical libraries. Failure of an engineer to recognize the applicability of existing data to his problem does not limit the state of the art.[11]

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[8] Day v. Barber-Coleman Co., 10 Ill. App. 2d 494, 135 N.E.2d 231 (1956). The *Day* court rejected the plaintiff's allegation that an overhead door fell on him as the result of the manufacturer's negligent design, basing its findings on the prior safe use of the product and "the state of the art at the time." *Day*, 135 N.E.2d at 233, 237. Unfortunately, neither judicial explanation nor contextual usage clearly defined the term as used in *Day*.

[9] Robb, *A Practical Approach to State of the Art Evidence in Strict Products Liability Cases*, 32 Def. L.J. 155, 158-59 (1983).

[10] 1 L. Frumer & M. Friedman, *Products Liability* § 6.05[15] (1986).

[11] *Id.*; *see also* Wiska v. St. Stanislaus Social Club, Inc. , 71 Mass. App. Ct. 813, 390 N.E.2d 1133, 1138 n.8 (1979)(Frumer and Friedman definition of state of art expressly adopted by court); Robb, *supra* note 9, at 159-60 (state of scientific, technological advancement available at time of manufacture advocated as sole correct definition and basis for principled limitation of liability).

Although the time dimension of this most limited definition of state of the art appears fairly clear cut,[12] the qualitative aspect of it is the subject of some confusion. The definition can incorporate, at one extreme, the most advanced thinking, principles and techniques available in theory or under laboratory conditions.[13] A middle ground insists upon some element of practicality, whereas the opposite extreme incorporates elements of industry custom and feasibility, including a risk-utility analysis.[14]

The concept of feasibility, standing alone, is a second definition given to state of the art. Feasibility goes beyond scientific-technological limitations to incorporate economic and utility factors as well. Engineers weigh the cost of competing design choices in relation to the maximum functioning of the product for its intended use. Market ability and ease of mass production are additional factors in the feasibility calculus.[15] Thus a product which is technologically possible may yet be outside the state of the art from a practical standpoint.[16]

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[12] Emphasis on the appropriate time frame explicit in this definition is aptly illustrated in Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976). The *Bruce* court rejected the plaintiff's contention that the passenger seats which broke from their fastenings during an airplane crash and blocked the exit were defectively designed. Plaintiff's only evidence on the issue was expert testimony that in 1970, eighteen years after the airplane was manufactured, seats which would withstand crash impact were in common use. The court compared consumers of a Model T automobile era to those in 1952 when the airplane was manufactured; neither would expect models of their era to incorporate safety features available only many years later. *Id.* at 447-48.

[13] O'Donnell, *Design Litigation and the State of the Art: Terminology, Practice and Reform*, 11 AKRON L. REV. 627, 632 (1978). *See supra* notes 10-11 and accompanying text.

[14] O'Donnell, *supra* note 13, at 631-32. The commentator notes that the first extreme is advocated by the plaintiff's bar; the opposite, by the defense bar. Courts follow an ill-defined middle ground. *Id.*; *see also* Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir.1968)(court distinguished "possible," technologically done by devoting disproportionate share of resources to problem, as opposed to "practical and useful"). O'Donnell has been criticized for confusing the precise technical definitions of state of the art as the result of his reliance on a non-existent and incorrect dictionary definition quoted in Raleigh, *The "State of the Art" in Products Liability: A New Look at an Old "Defense,"* 4 OHIO N.U. L. REV. 249, 258 & n.34 (1977). The erroneous definition refers to contemporaneous practical skills exercised within the industry. Robb, *supra* note 9, at 159-60 n.15.

[15] *See* Robb, *supra* note 9, at 159; Spradley, *supra* note 5, at 411-12; *see also* Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974)(alternative design must be feasible in terms of cost, practicality and technological possibility); Brady v. Melody Homes Mfg., 121 Ariz. 253, 589 P.2d 896, 903 n.4 (1978)("state of art" is feasibility of design), *disapproved on other grounds*, Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 709 P.2d 876 (1985)(en banc).

[16] The Texas Supreme Court appended its unique twist to the feasibility concept in

A third definition of state of the art encompasses the customs, practices and, to a lesser degree, the standards of an industry.[17] The standard or average conduct of the manufacturers within an industry sets the norm rather than that of the few who may be out-of-date or more technologically advanced than the bulk of their counterparts.[18] However, this norm may in some instances fail to reflect what the state of the art should be. Succinctly stated by Judge Learned Hand, "a whole calling may have unduly lagged in the adoption of new and available devices."[19]

As a final alternative, the state of the art may be viewed through standards for safety and design promulgated by federal or state statutes or administrative regulations, *e.g.*, the Federal Flammable Fabrics Act[20] and the National Traffic and Motor Vehicle Safety Act of 1966.[21] Additionally, the Occupational Safety and Health Act of 1970[22] mandates workplace safety.

However, despite the fact that four distinct definitions can be assigned to state of the art, confusion remains a reality because most courts have not attempted to precisely define the term as they employ it nor has their usage of the term within the context of their options been precise, often combining two or more of the definitions.[23]

While the courts have struggled to define state of the art semantically and in actual application, a few states have adopted statutes

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Boatland of Houston, Inc., v. Bailey, 609 S.W.2d 743 (Tex. 1980), by holding that a bass boat kill switch was infeasible because it was not commercially available at the time of manufacture. *Id.* at 749. *See generally* Comment, *Use of "State of the Art" Evidence in Strict Liability Claims: The New Texas Standard*, 33 BAYLOR L. REV. 165 (1981)(discussing parameters and admissibility of new Texas feasibility standard of state of art); Note, *Boatland of Houston, Inc. v. Bailey: Victory for the State of the Art Defense in Product Design Strict Liability*, 21 S. TEX. L.J. 489 (1980)(same).

[17] Weinberger, *The State of the Art and Products Liability*, 28 DEF. L.J. 303, 303-04 (1979). The commentator asserts that industry custom and practice were the original definition of state of the art prior to the development of a distinct body of products liability tort law. Further, he claims that state of the art evidence in most current products liability cases involve this concept of the term. *Id.* at 303; *see* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 44 (Alaska 1979)(state of art refers to customary practice in industry), *cert. denied*, 454 U.S. 894 (1981), *rev'd on other grounds*, Dura Corp. v. Harned, 703 P.2d 396 (Alaska 1985).

[18] Weinberger, *supra* note 17, at 303.

[19] The T. L. Hooper, 60 F.2d 737, 740 (7th Cir. 1932).

[20] 15 U.S.C. § 1191 (1982).

[21] 15 U.S.C. § 1392 (1982).

[22] 29 U.S.C. § 659 (1982).

[23] Robb, *supra* note 9, at 158-59.

which address the problem. Arkansas[24] and Tennessee[25] specifically define state of the art within the scope of scientific and technological knowledge available to the manufacturer at the time the product was marketed. Arizona,[26] Idaho[27] and Nebraska[28] use a similar definition but qualify it as knowledge which is in existence and reasonably feasible. Additionally, three states use the term state of the art without definition in their products liability statutes.[29] The proposed Model Uniform Products Liability Act approaches state of the art as practical technological feasibility, "the technological, mechanical and scientific knowledge relating to product safety that was reasonably feasible for use, in light of economic practicality, at the time of manufacture."[30]

B. Concepts of Defectiveness

The difficulties faced by courts and legislatures in shaping a workable definition of state of the art is juxtaposed against and compounded by the confusion among courts in defining "defect" under section 402A.[31] The courts are in semantic agreement that the test for defectiveness should focus on the nature of the product rather than the conduct of the manufacturer.[32] However, courts approach this focus on the viewpoints of two different groups: the consumer and the manufac-

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[24] ARK. STAT. ANN. § 34-2805 (Supp. 1985).

[25] TENN. CODE ANN. § 29-28-105 (1980).

[26] ARIZ. REV. STAT. ANN. § 12-681(6) (1982).

[27] IDAHO CODE § 6-1306(4) (Supp. 1986).

[28] NEB. REV. STAT. § 25-21, 182 (1985).

[29] *See* COLO. REV. STAT. § 13-21-403(1) (Supp. 1985); IND. CODE ANN. § 34-3-20A-4(4)(Burns Supp. 1986); KY. REV. STAT. ANN. § 411.310(2) (Baldwin 1981). *See generally* Note, *Product Liability Reform Proposals: The State of the Art Defense*, 43 ALB. L. REV. 941 (1979)(survey of state legislative statutes and proposals on products liability).

[30] Model Uniform Products Liability Act § 107(D)(Proposed Official Draft 1979).

[31] The *Restatement* imposes liability for a product sold in a "defective condition unreasonably dangerous" to the person or property of a user or consumer. RESTATEMENT (SECOND) OF TORTS § 402A(1)(1965).

[32] *E.g.*, West v. Johnson & Johnson Prod., Inc., 174 Cal. App. 2d 831, 220 Cal. Rptr. 437, 451 (1985)(strict liability in tort focuses jury's attention on condition of product while negligence action properly focuses on reasonableness of manufacturer's conduct). Central to this shift in focus is the courts' attempt to avoid both the concept of fault implicit in negligence and the severity of liability without fault implicit in absolute liability. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 601 (1980). A product oriented focus is easily workable when the defect is manufacturing mistake. It is less so when the defect results from intentional design choices. Strict liability defective design cases impugn not only the manufacturer's product but implicitly the design choice as well. *Id.* at 599-600.

turer. Both viewpoints have strengths and weaknesses.

Section 402A itself espouses the consumer expectations approach. The *Restatement* defines defective condition as one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[33] Unreasonably dangerous is dangerousness "to an extent beyond that which would be contemplated by the ordinary consumer who purchases [a product], with the ordinary knowledge common to the community as to its characteristics."[34] Numerous jurisdictions follow this test of defectiveness.[35] Although a consumer expectation analysis may in some cases ease the plaintiff's burden, the test has two drawbacks. First, if a danger is patent, the product may be considered not unreasonably dangerous beyond the consumer's expectations. Additionally, the subjective nature of the test is difficult to apply when complex designs are involved. The consumer does not have any realistic expectations as to how safely the product could or should have been designed.[36]

Similar to the consumer expectation test for defectiveness is a standard which deems the product defective if it is unsafe for its intended use. The terminology was first used by Justice Traynor in his landmark opinion in *Greenman v. Yuba Power Products, Inc.*,[37] which recognized strict liability in tort for defective products two years prior to publication of section 402A of the *Restatement*. Strict liability in tort is an outgrowth of liability for breach of the warranty of merchantability.[38] Thus, the "intended use" phraseology extends the

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[33] RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

[34] RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

[35] *See* Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976)(applying Oklahoma law; whether concern is with "defective condition" or "unreasonably dangerous" requirements of § 402A, plaintiff must show product dangerous beyond expectation of ordinary consumer); Hohlenkamp v. Rheem Mfg. Co., 134 Ariz. 208, 655 P.2d 32, 34 (1982)(whether hot water heater which ignited flammable vapors was defective in design should be determined from viewpoint of consumer); Lamke v. Futorian Corp., 709 P.2d 684, 686 (Okla. 1985)(plaintiff failed to establish cigarettes were more likely to set couch afire than would be expected by ordinary consumer); Reichelt v. Johns-Manville Corp., 42 Wash. App. 620, 712 P.2d 881, 885 (1986)(ordinary consumer who had been informed asbestos insulation was hazardous, who knew it caused clubbing of his fingers and breathing difficulty would consider product unsafe beyond his reasonable expectations).

[36] Birnbaum, *supra* note 32, at 613-14. Professor John Wade criticizes both the consumer expectation and intended use perspectives as outdated warranty methods of thinking which have a single limited basis for liability. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 833-34 (1973). *See infra* notes 42-45 and accompanying text.

[37] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[38] Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV.

loss of the bargain concept found in warranty law by recognizing in it connotations of consumer expectations that have been thwarted by failure to receive that for which one had contracted.[39] A number of courts employ the intended use test for defectiveness.[40]

By contrast, many jurisdictions consider the more realistic approach to determine defectiveness to be the risk-utility analysis espoused by Professors Wade and Keeton.[41] Defectiveness is viewed from the manufacturer's viewpoint but differs from the due care negligence standard in that knowledge of the defect prior to sale of the product is imputed to the manufacturer. The test becomes whether a reasonably prudent manufacturer, having actual knowledge of the defective nature of his product at the time of manufacture, would have placed it on the market.[42] Application of the test balances the following factors: utility

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551, 554-55 (1980).

[39] *Id.*

[40] *See* Huddell v. Levin, 537 F.2d 726, 740 (3d Cir. 1976)(crashworthiness action applying New Jersey law; head restraint defective if not reasonably fit for ordinary purposes for which it was sold examined within context of particular risk); Self v. General Motors Corp., 42 Cal. App. 3d 1, 6, 116 Cal. Rptr. 575, 578 (1974)(crashworthiness action; after progression past fitness for intended use, defective design is amorphous concept which includes notion of excessive preventable danger); Mason v. Caterpillar Tractor Co., 139 Ill. App. 3d 511, 487 N.E.2d 1043, 1047-48 (1985)(expert testimony on alternate design of tractor "track shoe" was speculative and insufficient to establish that product failed to perform as expected in light of its nature and intended function); Hubbard v. Chicago Housing Auth., 138 Ill. App. 2d 1013, 487 N.E.2d 20, 23 (1985) (steam pipes not defective because hotness is inherent propensity to be reasonably expected in light of nature and intended function of pipes); Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964, 970 (1978)(warranty action; fitness of motor home for ordinary purposes dependent on consumer expectations derived from balancing factors of harm, feasibility, cost and utility); Huppe v. Twenty-First Century Restaurants of America, Inc., 497 N.Y.S.2d 306, 308 (1986)(coffee which is not excessively hot is not unreasonably dangerous for its intended purpose); Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 499 A.2d 326, 329 (1985)(defectiveness of drum truck defined in terms of safety for intended use).

[41] *See* Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1078-82 (5th Cir. 1986)(under Texas product liability law which requires risk-utility balancing, plaintiff should be allowed to prove number of potential tire rim base-side ring mismatches); General Motors Corp. v. Edwards, 482 So. 2d 1176, 1188 (Ala. 1985)(Wade risk-utility analysis superior to benefit-risk analysis in crashworthiness cases under Alabama Extended Manufacturer's Liability Doctrine); O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298, 306 (1983)(defectiveness of above-ground swimming pool design determined by risk-utility analysis); Boatland Inc. v. Bailey, 609 S.W.2d 743, 745-46 (Tex. 1980)(design defect cases require jury to balance product utility against likelihood and gravity of injury).

[42] Wade, *supra* note 36, at 839-40. By contrast, Professor Keeton's analysis shifts the pertinent time frame to the time of trial. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38 (1973). The Wade-Keeton risk-utility analysis has

of the product, likelihood and seriousness of the injury, availability of a safer design, manufacturer's ability to improve safety without impairing utility or costs, user's ability to avoid danger, user's awareness of dangers due to their obvious nature or to warnings, and feasibility of the manufacturer spreading the loss.[43] Proponents of this risk-utility balancing approach defend its similarity to negligence principles on the grounds that in defective design cases proof which shows the product is so dangerous that strict liability is applicable will also be sufficient to show negligent conduct by the manufacturer. He will be deemed negligent for failure to learn of the defect.[44] Additionally, an analogy is made to strict liability for abnormally dangerous activities as justification for utilizing a balancing approach to strict liability in tort under section 402A.[45]

C. Policies Underlying Adoption of Section 402A

A third background factor which may influence the admissibility of state of the art evidence, in addition to the definitions of "state of the art" and "defectiveness," is the rationale of a court for its adoption and utilization of section 402A. Courts generally employ two fundamental rationales: cost spreading and accident minimization.[46] The lat-

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been labeled the "reasonably prudent manufacturer test." Birnbaum, *supra* note 32, at 618.

[43] Wade, *supra* note 36, at 837-38. Keeton includes as a benefit anything which gives utility to the product. Other factors are infeasibility and additional cost of a safer design. Keeton, *supra* note 42, at 38.

[44] Wade, *supra* note 36, at 836-37. The approach is somewhat similar to negligence *per se*. *Id.* at 835.

[45] *Id.* Strict liability for abnormally dangerous activities is imposed without negligence by a balancing process. RESTATEMENT (SECOND) OF TORTS § 520 (1976).

[46] Spradley, *supra* note 5, at 407-10. For jurisdictions espousing these rationales, *see* Becker v. IRM Corp., 38 Cal. 3d 454, 467, 698 P.2d 116, 123-24, 213 Cal. Rptr. 213, 221 (1985)(en banc)(cost spreading rationale applies to landlord as well as builder because former is integral part of enterprise); Price v. Shell Oil Co., 2 Cal. 2d 245, 251-53, 466 P.2d 722, 725-26, 85 Cal. Rptr. 178, 181-83 (1970)(en banc)(cost spreading rationale applies to bailor-lessor); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276, 279 (1975)(protection of public from manufacturer putting defective product in stream of commerce is basis of liability); Wheeler v. Andrew Jergens Co., 696 S.W.2d 326, 328 (Ky. Ct. App. 1985)(minimize risk to consumer by charging cost to manufacturer who can spread loss or purchase insurance). *But cf.*, Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 367 N.W.2d 820, 826-28 (1985)(risk spreading rationale not applicable to product line exception to successor corporation non-liability).

In Bastian v. Wausau Homes, Inc., 620 F. Supp. 947 (N.D. Ill. 1985), a strict liability and warranty action against a builder-vendor of mass-produced homes for fire damages caused by a defective electric baseboard heater, the federal district court enumerated

ter incorporates both deterrence and incentive concepts.[47] Justice Traynor in *Greenman v. Yuba Power Products, Inc.* first stated the underlying policy thusly: "[T]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[48]

Overemphasis of the cost spreading rationale can, however, discourage admissibility of any of a defendant's state of the art evidence thus pushing strict liability more toward absolute liability.[49] Likewise, exclusion of evidence of technological impossibility under an accident deterrence rationale tends to promote absolute liability.[50] However, the accident minimization rationale, viewed from its incentive perspective, better justifies exclusion of a technological impossibility defense.[51]

Apart from the economic-safety rationales for strict liability in tort, concern for easing the plaintiff's burden of proof by not requiring proof of a specific act of negligence by the manufacturer was a third major influence.[52] However, one commentator cautions plaintiffs not to be misled into the belief that they no longer have to prove fault.[53] This

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seven policy considerations. *Bastian*, 620 F. Supp. at 949-50. They include:

> . . . public interest in human life and health, . . . the invitations and solicitations of the manufacturer to purchase the product, . . . the justice of imposing the loss on the manufacturer who created the risk and reaped the profit by placing the product in the stream of commerce, . . . the superior ability of the commercial enterprise to distribute the risk of injury proximately caused by the defective condition of its product by passing the loss on to the public as a cost of doing business, . . . the disparity in position and bargaining power which forces the consumer to depend entirely on the manufacturer, . . . the difficulty of requiring the injured party in consumer products cases to trace back along the channel of trade to the source of production in the search for the origin of the defect in order to prove negligence, . . . [w]hether the "product" is in the stream of commerce . . . .

Id.

[47] Spradley, *supra* note 5, at 409-10.

[48] *Greenman*, 59 Cal. 2d at ____, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[49] Spradley, *supra* note 5, at 408. One commentator urges that consideration should be given to the adequacy of the consumer's insurance coverage as opposed to that of the manufacturer and to the inability of smaller businesses to absorb and pass along costs. *Id.* at 408-09.

[50] *Id.* at 409.

[51] *Id.* Spradley criticizes exclusion of technological impossibility evidence under the incentive rationale by asserting that courts incorrectly assume that a manufacturer has unlimited resources to devote to any given design problem. *Id.* at 409-10.

[52] Wade, *supra* note 36, at 826.

[53] Bowman, *The Products Liability Action-Investigation, Preparation and Trial*, TORT TRENDS 17, 17-18 (1970)(proceedings of twenty-fifth annual Mississippi Law

commentator posits that defectiveness must still be proved by a deviation from the standard of care defined by feasible industry "state of the art" knowledge, that "departure from prudent conduct is still the offense and fault is still the basic premise upon which liability is founded."[54]

D. The Burden of Proof

The plaintiff who alleges a design defect under section 402A encounters no problems with his use of state of the art evidence. Rather, he uses it by judicial mandate. In strict products liability actions, the plaintiff has the burden of proving that the product was in a defective condition unreasonably dangerous to him, that the defect existed at the time the product left the manufacturer's control, and that the defect proximately caused his injury.[55] Courts either permit or require the plaintiff to prove his case-in-chief through state of the art evidence as it is variously defined. For example, some states *require* that proof of design defectiveness includes feasibility of an alternative design

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Institute).

[54] *Id.* at 18 (quoting Dean Prosser that plaintiff may get to jury more often under strict liability but without proof of fault will likely win no more cases than he did under negligence).

[55] *See, e.g.*, O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298, 303 (1983)(requirement that plaintiff's prima facie case show proof of defect distinguishes strict from absolute liability, prevents manufacturer from becoming insurer of product yet eases burden of proof required under negligence). In 1978, California instituted a variation on the traditional allocation of burden of proof in Barker v. Lull Eng'g Co., 20 Cal. 2d 412, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). Recognizing the drawbacks of the consumer expectation test as applied to design defects, the *Barker* court created a bifurcated standard which gives the plaintiff the option of proving design defect either by failure of the product to meet consumer expectations for safe performance or by causation between design and injury if the defendant is unable to prove the design benefits outweigh its risks. *Barker*, 20 Cal. 2d at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239; *see also* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979) (adopting *Barker* two-prong test). *But see* Hayes v. Ariens Co., 391 Mass. 407, 462 N.E.2d 273, 274 (1984)(declining to follow *Barker*).

Under the second alternative of the *Barker* test, the plaintiff, merely by proving the product caused his injury, shifts the burden of proof to the defendant to prove the benefits of the product outweigh its risks. *Barker*, 20 Cal. 2d at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234. The shift assures admissibility of the defendant's state of the art evidence but at great expense to him. *See* Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643, 651 (1978)(*Barker* requires defendant to routinely justify all design features which plaintiff merely implicates were involved in accident). The California Supreme Court justified its decision on the grounds that technical design matters were best known by the manufacturer. *Barker*, 20 Cal. 2d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

and/or non-compliance with design standards established by the relevant industry, a voluntary association or a governmental entity.[56] Other states hold that feasibility and non-conformity with standards *may* constitute a portion of the plaintiff's proof.[57]

In a 1983 opinion, the New Jersey Supreme Court held in *O'Brien v. Muskin Corp.*[58] that a plaintiff was not required to prove a safer, feasible alternative design. Instead, he establishes his prima facie case by merely proving that the risk created by the product design outweighed its utility.[59] The court incorporates in its risk-utility analysis the seven Wade factors.[60] The *O'Brien* standard has been criticized, however, as one which may allow a jury to find defective any product involved in an accident.[61]

E. The Mississippi Position

To establish the Mississippi position regarding the definition of

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[56] *See* Lolie v. Ohio Bass Co., 502 F.2d 741, 744 (7th Cir. 1974)(alternative design feasible in terms of cost, practicality and technology); General Motors Corp. v. Edwards, 482 So. 2d 1176, 1189 (Ala. 1985)(crashworthiness case; safer, practical alternative design which would have prevented or limited user's injuries); Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 268 N.W.2d 291, 295 (1978)(non-comformity with design standards of industry, government body or authoritative voluntary association); Wilson v. Piper Aircraft Corp., 292 Or. 61, 577 P.2d 1322, 1327 (1978)(technically feasible, practical alternative design). *But cf.*, Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976)(three-fold burden of proof; alternative design, extent of injuries from safer alternative, extent of enhanced injuries from defective design).

[57] *See* Anderson v. Hyster Co., 74 Ill. 2d 364, 385 N.E. 2d 690, 692 (1979)(feasibility of alternative design or non-conformity with standards of industry, voluntary association or government).

[58] 94 N.J. 169, 463 A.2d 298 (1983). *See supra* note 55.

[59] *O'Brien*, 463 A.2d at 303. The *O'Brien* plaintiff, who sustained injuries when he dove into an above-ground swimming pool, was allowed on remand to present state of the art evidence in reference to the risk-utility analysis to prove that the product was defective. *Id.* at 302, 305. The court defined state of the art as "the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed." *Id.* at 305. Using this definition, the court concluded that although no alternative methods might be available for a less slippery pool bottom, the jury could nevertheless find the pool design defective because the utility of the pool was outweighed by its risk. *Id.* at 306.

[60] *Id.* at 304-05; *see supra* note 43 and accompanying text.

[61] *O'Brien*, 463 A.2d at 315 (Schrieber, J., dissenting); *see also* Note, *Products Liability — Strict Liability in Tort State-of-the-Art Evidence Relevant to Risk-Utility Analysis in Design Defect Cases — O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298 (1983)*, 15 SETON HALL L. REV. 120, 142 (1984)(court's failure to provide realistic standard by which to determine amount of risk-utility proof required from plaintiff to present jury question assures plaintiff will virtually always get to jury).

state of the art evidence, the concept of defectiveness, the policy considerations underlying adoption and implementation of section 402A and the burdens of proof between the parties, products liability cases decided by the Mississippi Supreme Court and the federal courts applying Mississippi law since 1966[62] have been reviewed.

First, the term "state of the art" apparently has been used in only two Mississippi Supreme Court decisions, *Walton v. Chrysler Motor Corp.*[63] and *Toliver v. General Motors Corp.*, the alpha and the omega of the second accident doctrine in Mississippi.[64] In *Walton*, the court quotes from *Larsen v. General Motors Corp.*[65] stating "[t]he sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present 'state of the art.' "[66] The term is not further elaborated. However, in *Toliver* the court uses the term in discussing the necessity that fuel tanks be affixed in some manner to an automobile.[67] The court notes that the automobile engineer must consider practical feasibility such as aerodynamics and cost as well as industry standards to determine the safest possible location.[68] Thus, it appears that at a minimum Mississippi incorporates both the practical feasibility and industry standards dimensions within its definition of state of the art.[69] Additionally, frequent references in the cases to in-

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[62] See *supra* note 7.

[63] 229 So. 2d 568 (Miss. 1969).

[64] See *supra* note 2.

[65] 391 F.2d 495 (8th Cir. 1968).

[66] *Id.* at 502. *Larsen* was adjudicated under a negligence theory of defective design. *Id.* The *Walton* court holding rejected the *Larsen* rationale. *Walton*, 229 So. 2d at 572.

[67] *Toliver*, 482 So. 2d at 218.

[68] *Id.*

[69] A number of cases have admitted evidence of feasibility of design choices and of industry standards without denominating it as state of the art evidence. *See* Dixon v. International Harvester Co., 754 F.2d 573, 582 (5th Cir. 1985)(conflicting industry standards (ANSI) introduced by both parties on issue of defectiveness but conformance with standards not conclusive proof of non-defectiveness); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 163 (5th Cir. 1983)(evidence by defendant that plaintiff was negligent in failing to follow industry standards for recommended tire inflation pressure); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1183 (5th Cir. 1971)(defendant introduced standards followed by meat grinder manufacturing industry at time of manufacture); Howard v. Sears, Roebuck & Co., 437 F. Supp. 883, 898 (S.D. Miss. 1977)(defense expert testified to non-existence of applicable industry or government standards in strict liability action for defective refrigerator), *aff'd*, 584 F.2d 388 (5th Cir. 1978); Fincher v. Ford Motor Co., 399 F. Supp. 106, 109-11 (S.D. Miss. 1975)(evidence of design feasibility and industry standards from both parties admitted in negligence-strict liability action on defectively designed tractor starter mechanism), *aff'd*, 535 F.2d 657 (5th Cir. 1976); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744, 746 (Miss. 1973)(in strict liability action for

dustry custom evidence admitted either in adjunct to[70] or independently of[71] industry standards and feasibility evidence create a strong inference that custom too may be a part of the Mississippi definition of state of the art.

Second, in its seminal strict liability in tort case, *State Stove*, the Mississippi Supreme Court discussed its concept of product defectiveness in the dual terms of unfitness for an intended use and of an un-

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damages caused by malfunctioning humidifier, air conditioner and humidifier deemed constructed to correct industry standards). *But cf.* Lenoir v. C. O. Porter Mach. Co., 672 F.2d 1240, 1247 (5th Cir. 1982)(OSHA safety standards not admissible on issue of negligence, but plaintiff's failure to object in instant case was harmless error), *disagreed with by* Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985); Otto v. Specialties, Inc., 386 F. Supp. 1240, 1245 (N.D. Miss. 1974)(Supreme Court of Mississippi would refuse to admit OSHA safety standards as either conclusive proof or some evidence of negligence).

[70] *See* McCullough v. Beech Aircraft Corp., 587 F.2d 754, 761 (5th Cir. 1979)(in strict liability action plaintiff's expert testimony alleged aircraft engine which differed from feasible systems customarily used was defective); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1183, 1185 n.26 (5th Cir. 1971)(defendant's evidence of industry custom, practice and standards are proper factors to determine reasonableness but are not controlling on issue of negligence); Howard v. Sears, Roebuck & Co., 437 F. Supp. 883, 898, 905 (S.D. Miss. 1977)(plaintiff failed to refute defendant's evidence that use of polyurethane as refrigerator insulation was custom in industry and that no standards prohibited its use), *aff'd*, 584 F.2d 388 (5th Cir. 1978); Fincher v. Ford Motor Co., 399 F. Supp. 106, 110-11 (S.D. Miss. 1975)(tractor operation manual which contained no warning on cranking engine in gear was comparable to all others in industry; safer engine feasible but not used by majority of industry nor mandated by standards), *aff'd.* 535 F.2d 657 (5th Cir. 1976); Ford Motor Co. v. Broadway, 374 So. 2d 207, 210 (Miss. 1979)(plaintiff's expert admitted use of auxiliary safety switch mechanism on tractor was feasible but not prevalent industry custom in 1958); Hamilton Fixture Co. v. Anderson, 285 So. 2d 744, 746 (Miss. 1973)(plaintiff's expert testified installation design of humidifier was contrary to generally accepted engineering practices; humidifier itself properly designed).

[71] *See* Gray v. Manitowoc Co., 771 F.2d 866, 870-71 (5th Cir. 1985)(defendant's uncontested evidence that universal industry practice of using signalman on ground to guide crane operator was controlling to establish open and obvious defect); Page v. Barko Hydraulics, 673 F.2d 134, 138 (5th Cir. 1982)(in strict liability prevailing industry custom is inconclusive and does not preclude finding that limb loader was defective); Gordon v. Niagara Mach. & Tool Works, 574 F.2d 1182, 1190 (5th Cir. 1978)(universal custom in industry to supply multi-functional, general purpose machine without safety devices); Falstaff Brewing Corp. v. Williams, 234 So. 2d 620, 622 (Miss. 1970)(in strict liability action defendant bottler's expert testified that bottling methods followed customary accepted industry procedures); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 122 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967)(defendant's evidence shows safety devices not customarily installed by water heater manufacturer); *cf.* Turner v. Big Four Automotive Equip. Corp., 511 F.2d 133, 134 (5th Cir. 1975)(plaintiff failed to prove any tire changers on market in 1966 to hold tire in place during explosion without use of additional safety devices).

reasonably dangerous condition not contemplated by the consumer.[72] Subsequent cases have adhered to either the intended use test[73] or the consumer expectation test.[74]

Third, Mississippi cases support each of the three rationales generally articulated in support of a strict liability in tort theory: cost spreading, accident minimization and easing the plaintiff's burden of proof.[75] *State Stove* first asserts the cost spreading policy of Justice Traynor in his innovative *Greenman* opinion.[76] In 1970, in *Falstaff Brewing Corp. v. Williams*,[77] the Mississippi Supreme Court reiterated its initial policy decision and recognized as well the accident minimization rationale. The court stated ". . . policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[78] The *Toliver* opinion introduces the third element of policy, stating "[t]he rationale for the imposition of this absolute liability is two-fold: to shift the cost of injuries from the public to the manufacturer, . . . (citations omitted) and to assist the plaintiff in establishing what

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[72] *State Stove*, 189 So. 2d at 120-21; *accord* Toliver v. General Motors Corp., 482 So. 2d 213, 216-17 (Miss. 1985)(dual concepts); Early-Gary Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974)(same); *see supra* notes 33-34, 37-39 and accompanying text.

[73] *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 512 (5th Cir. 1984)(intended use), *reh'g granted*, 750 F.2d 1314 (1985), *cert. denied*, 106 S. Ct. 3339 (1986); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1187 (5th Cir. 1971)(same); Fincher v. Ford Motor Co., 399 F. Supp. 106, 114 (S.D. Miss. 1975)(same), *aff'd*, 535 F.2d 657 (5th Cir. 1976); Williams v. Cessna Aircraft Corp., 376 F. Supp. 603, 605 (N.D. Miss. 1974)(same); Dunson v. S.A. Allen, Inc., 355 So. 2d 77, 78 (Miss. 1978)(same); William Cooper & Nephews, Inc. v. Pevey, 317 So. 2d 406, 408 (Miss. 1975)(same); Coleman v. Ford Motor Co., 240 So. 2d 607, 610 (Miss. 1970)(same); Walton v. Chrysler Motor Corp., 229 So. 2d 568, 572 (Miss. 1969)(same), *rev'd on other grounds*, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985).

[74] *See* Gray v. Manitowoc Co., 771 F.2d 866, 869 (5th Cir. 1985)(consumer expectation test); Page v. Barko Hydraulics, 673 F.2d 134, 138 (5th Cir. 1982)(same); McCullough v. Beech Aircraft Corp., 587 F.2d 754, 759 (5th Cir. 1979)(same); Ford Motor Co. v. Matthews, 291 So. 2d 169, 172 (Miss. 1974)(same).

[75] *See generally* Maraist & Barksdale, *Mississippi Products Liability — A Critical Analysis*, 43 MISS. L.J. 139 (1972)(discussing policies underlying strict liability in tort and effects of policies on Mississippi court decisions).

[76] *State Stove*, 189 So. 2d at 120; *see supra* note 48 and accompanying text.

[77] 234 So. 2d 620 (Miss. 1970).

[78] *Id.* at 623; *see also* Powe v. Wagner Elec. Sales Corp., 589 F. Supp. 657, 661 (S.D. Miss. 1984)(public policy of improving product safety not served if manufacturer unable to learn nature of defect in his product when plaintiff fails to preserve evidence); *cf.* Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1189 (5th Cir. 1971)(interest in personal injury prevention must be balanced against need for viable enterprises but trend in Mississippi not toward absolute liability for manufacturers).

would otherwise be a near-impossible burden of proof."[79] The court approved Dean Wade's observation that strict liability eliminates the plaintiff's need to prove negligence on the part of the manufacturer either directly or circumstantially through *res ipsa loquitur*.[80]

While relieving the plaintiff's burden, strict liability does not, however, impose on the manufacturer the role of insurer of his products[81] nor does it require a perfectly safe product.[82]

Finally, the burden of proof which a Mississippi plaintiff must meet to sustain a prima facie case in strict liability in tort derives from the wording of section 402A itself.[83] The cases are in agreement that the basic burden is three-fold: (1) the product contained a defect which made it unreasonably dangerous, (2) the defect existed at the time the product left the hands of the manufacturer, and (3) the defect in the product was the proximate cause of the plaintiff's injury.[84] One recent Fifth Circuit Court of Appeals case, *Mozingo v. Correct Manufacturing Corp.*,[85] enumerates an additional burden: the plaintiff must prove that the manner in which he was using the product was reasonably foreseeable.[86] By contrast, other Mississippi products liability cases speak of unforeseeable misuse as a defense to be asserted by the defendant.[87]

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[79] *Toliver*, 482 So. 2d at 215. The *State Stove* court as well notes that strict liability differs from negligence in that the plaintiff does not have to prove that the defendant negligently created the unsafe condition of the product or was even aware of it. However, the court does not refer to this difference as a policy reason for adoption of § 402A. *State Stove*, 189 So. 2d at 121.

[80] *Toliver*, 482 So. 2d at 215-16, quoting Wade, *supra* note 36, at 826.

[81] *State Stove*, 189 So. 2d at 120.

[82] *Id.* at 121.

[83] *See supra* note 4.

[84] *See* Price v. Admiral Corp., 527 F.2d 412, 414 (5th Cir. 1976)(three-fold burden); Lovelace v. Astra Trading Corp., 439 F. Supp. 753, 758 (S.D. Miss. 1977)(three-fold burden, quoting with approval Wade's risk-utility factors as determinative of "unreasonably dangerous"); Baker v. Ford Motor Co., 317 So. 2d 51, 52 (Miss. 1975)(three-fold burden), *rev'd on other grounds*, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985); Early-Gary Inc. v. Walters, 294 So. 2d 181, 186 (Miss. 1974) (same); Ford Motor Co. v. Matthews, 291 So. 2d 169, 172 (Miss. 1974)(same); Coleman v. Ford Motor Co., 240 So. 2d 607, 610 (Miss. 1970)(two-fold burden contains three basic elements of proof); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967)(same).

[85] 752 F.2d 168 (5th Cir. 1985).

[86] *Id.* at 176.

[87] In two 1974 cases the Mississippi Supreme Court recognized abnormal product misuse as a defense in strict liability in tort actions. In Ford Motor Co. v. Matthews, 291 So. 2d 169 (Miss. 1974), the court approved the position of § 402A, comment h, which states that "[a] product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not

Dicta in the *Toliver* decision adds another dimension to the plaintiff's burden by stating that he "*may* introduce evidence of industry standards, to show deviation therefrom, or an alternative design, to show the feasibility thereof."[88] (Emphasis added). Plaintiff is allowed to meet his basic three-part burden by either direct or circumstantial evidence.[89] In *Baker v. Ford Motor Co.*,[90] the Mississippi Supreme Court extended the use of circumstantial evidence in a strict liability action even further to embrace the negligence rule of evidence, *res ipsa loquitur*.[91]

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liable." *Id.* at 174 (quoting RESTATEMENT (SECOND) OF TORTS, § 402A, comment h). The court distinguished foreseeable misuse from abnormal and unintended use, the latter being a defense if the use was unforeseeable. *Matthews*, 291 So. 2d at 174. In holding that the plaintiff's conduct in starting his tractor in gear was not a defense for defendant under the instant facts, the court equated plaintiff's conduct to foreseeable misuse and contributory negligence. *Id.* at 174-75. Shortly following its *Matthews* decision, the supreme court again recognized the unforeseeable misuse defense in Early-Gary, Inc. v. Walters, 294 So. 2d 181 (Miss. 1974), an action for personal injuries sustained when a catsup bottle broke as a result of a hand thump on its base to dislodge the catsup. *Id.* at 182, 186. The court affirmed that abnormal use was a question of fact and refused to overturn the trial court finding that plaintiff's use was not an abnormal, unforeseeable misuse. *Id.* at 186-87. *See also* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 289 (5th Cir. 1975) (Mississippi follows § 402A comment h thus injecting foreseeability and proximate cause into strict liability to avoid imposition of excessive liability on manufacturers).

[88] *Toliver*, 482 So. 2d at 218.

[89] On the proximate cause question, plaintiff can sustain his burden in strict liability by reasonable inference from circumstantial evidence. Ford Motor Co. v. Matthews, 291 So. 2d 169, 173 (Miss. 1974). Facts which allow an inference of defective quality which in turn was a substantial element in the plaintiff's injury are sufficient. *Id.* at 173; *see also* McCullough v. Beech Aircraft Corp., 587 F.2d 754, 759, 761-62 (5th Cir. 1979)(trial court's erroneous misstatement of evidence destroyed plaintiff's circumstantial case); Price v. Admiral Corp., 527 F.2d 412, 415 (5th Cir. 1976)(jury could infer from direct and circumstantial evidence that defect existed in refrigerator, notwithstanding defect was not pinpointed); Powe v. Wagner Elec. Sales Corp., 589 F. Supp. 657, 661 (S.D. Miss. 1984)(plaintiff's circumstantial evidence failed to prove master cylinder was cause of brake failure); Howard v. Sears, Roebuck & Co., 437 F. Supp. 883, 906 (S.D. Miss. 1977)(under Mississippi law plaintiff does not have to prove specific defect in freezer to carry burden of proof in strict liability action for fire death of child), *aff'd*, 584 F.2d 388 (5th Cir. 1978); William Cooper & Nephews, Inc. v. Pevey, 317 So. 2d 406, 408-09 (Miss. 1975)(circumstantial evidence of defect permissible but not preferable when facts capable of proof by direct chemical analysis); Ford Motor Co. v. Cockrell, 211 So. 2d 833, 839 (Miss. 1968)(latent defect in truck wiring system proved by direct and circumstantial evidence).

[90] 317 So. 2d 51 (Miss. 1975), *rev'd on other grounds*, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985).

[91] In *Baker* the court held that the automobile owner's proof against the manufacturer for defective brakes and against the auto dealer for failure to inspect and correct

Although *Toliver* urges that one rationale of strict liability is to ease the plaintiff's burden of proof by eliminating the requirement that he prove negligence on the part of the defendant,[92] the cases to date belie this assertion. In reality, Mississippi strict liability case law abounds with traditional negligence principles and defenses.[93] Hence, the dissimilarities between the two theories of liability prior to *Toliver* have been difficult to distinguish in many court opinions. For example, a fundamental negligence concept which is injected into a number of strict liability decisions is that of duty.[94] The existence of a duty owed by the defendant to the plaintiff, a question of law decided by the court, is the initial determinative factor in establishing the liability of the defendant under a negligence theory.[95] The seminal strict liability case *State Stove* bases its rejection of the privity requirement in a negligence products action[96] on the duty concept. The court states "[t]he conclusion is clear that the duty extends to anyone who may reasonably be expected to be in the vicinity of the chattel's probable use, and to be endangered if it is defective."[97] The court in 1968, in *Ford Motor Co. v. Cockrell*,[98] quoted this passage in a strict liability context to extend a truck manufacturer's liability to a plaintiff who was neither a consumer nor a user.[99] Plaintiff Cockrell, a bystander, was pinned be-

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the defect taken with all inferences of "evidence by the accident itself, or res ipsa loquitur," was insufficient to make out a prima facie case against either defendant. *Id.* at 52, 54-55. The court affirmed directed verdicts for both defendants. *Id.* at 55. One commentator criticized the court's use of res ipsa in strict liability actions such as *Baker* as a method of achieving absolute liability in certain situations. Griffith & Griffith, *The Doctrine of Res Ipsa Loquitur in Negligence Actions — Old Solutions for New Problems*, 48 MISS. L.J. 259, 301-02 (1977).

[92] *See supra* note 80 and accompanying text.

[93] *See supra* note 91; *see infra* notes 94-118 and accompanying text.

[94] Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971), elaborates the four classic elements of a negligence action: "(1) plaintiff must be protected under some rule of law against defendant's conduct (duty); (2) defendant's conduct must have violated this duty (breach); (3) plaintiff's injury must be the result of defendant's conduct (causal relationship); and (4) plaintiff must have suffered a loss (damage)." *Id.* at 1181; *see also* W. PROSSER, LAW OF TORTS 146 (3d ed. 1964).

[95] *Id.* at 1181 n.15. The extent of the duty, or the appropriate standard of conduct, is a mixed question of law and fact. *Id.*; *cf.* Ford Motor Co. v. Broadway, 374 So. 2d 207, 211 (Miss. 1979)(manufacturer's standard of care is reasonably safe product, not perfectly safe one, quoting *State Stove*).

[96] The defendant manufacturer in *State Stove*, which was originally brought as a negligence action, asserted lack of privity between itself and plaintiff as a defense. *State Stove*, 189 So. 2d at 118.

[97] *Id.* at 116.

[98] 211 So. 2d 833 (Miss. 1968).

[99] *Id.* at 836.

tween two trucks when one of the vehicles lurched forward from its parked position.[100] The following year the supreme court in *Walton v. Chrysler Motor Corp.* adopted the second accident doctrine on the grounds that the manufacturer's liability could be predicated only on the existence of a duty.[101] The court stated that while strict liability eliminated plaintiff's burden of proving negligence, it did not eliminate the requirement that a duty must be owed to the plaintiff with regard to the defect which grew out of the intended normal use of the product.[102] In its 1975 opinion in *Baker v. Ford Motor Company*, the court placed on plaintiff the affirmative burden of showing that defendant violated a duty owed to plaintiff which resulted in injury to him.[103] *Baker* did not involve a second accident theory but rather was a strict liability action for alleged failure of automobile brakes.[104]

In addition to using the duty concept in connection with the intended use of a product, the Mississippi court has used duty to circumscribe the circle of liability as to potential defendants.[105] In *Sam Shainberg Company of Jackson v. Barlow*,[106] the court stated its unwillingness to extend strict liability in tort to a wholesaler or retailer when the product defect was a latent one and the defendant a mere sales conduit.[107] In another limiting decision, the court in *Pridgett v.*

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[100] *Id.* at 834. Electrical wiring which caught fire and engaged the starter motor on the four-month-old truck was deemed improperly assembled and inspected. *Id.* at 837, 839.

[101] *Walton*, 229 So. 2d at 573; *see supra* note 2 and accompanying text.

[102] *Id.* The court concluded that no liability arose for defects in the product which did not cause or contribute to the cause of the accident. *Id.* at 572; *see, e.g.*, Jones v. Babst, 323 So. 2d 757, 759 (Miss. 1975)(improperly torqued lug nuts, not defective tires), *rev'd*, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985); General Motors Corp. v. Howard, 244 So. 2d 726, 727 (Miss. 1971)(collision with Mack truck, not failure of steering wheel to telescope), *rev'd*, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985). The overruling of *Walton* and its progeny shifts the duty focus from the original causative event to that of the injury-enhancing event. *Toliver*, 482 So. 2d at 214.

[103] *Baker*, 317 So. 2d at 52.

[104] *Id.*; *see supra* note 90 and accompanying text.

[105] Maraist & Barksdale, *supra* note 75, at 151.

[106] 258 So. 2d 242 (Miss. 1972).

[107] *Id.* at 246. The court faulted plaintiff's complaint for its failure to aver that a duty was owed Shainberg's co-defendant, Shainberg-Tennessee. *Id.* at 244. Further, the court criticized that the only duty plaintiff asserted as to Shainberg of Jackson was the "duty to sell only such articles of merchandise, including ladies shoes, as are reasonably safe when used in the manner and for the purposes for which they were sold." *Id.* The court based its reasoning for limiting strict liability under the Shainberg facts on a Frumer and Friedman statement pertaining to *negligence* actions. (Emphasis added). *Id.* at 246.

Jackson Iron and Metal Co.[108] affirmed a directed verdict for a co-defendant, a seller of used products, on the grounds that plaintiff did not meet its burden of proving that a duty was owed to it relating to the used product in question.[109] The similarity between negligence and strict liability in tort in Mississippi evinced by incorporation of the duty concept in the latter is further strengthened by the defenses available under both theories. Assumption of the risk[110] and contributory negligence[111] have been recognized by the courts in section 402A actions. A defect that is open and obvious as opposed to latent is not deemed to be unreasonably dangerous.[112] A superseding, intervening cause defense may emphasize changes which occurred after the product left the hands of the manufacturer,[113] unforeseeable misuse of the

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[108] 253 So. 2d 837 (Miss. 1971).

[109] *Id.* at 841. Co-defendant Magna used 55-gallon drums of paint at its small garden tool manufacturing plant, then resold the empty drums as scrap iron to defendant Jackson Iron & Metal Co. *Id.* at 839. One drum exploded when plaintiff Pridgett sought to cut it with an acetylene torch without removing the bung caps as he had been instructed. *Id.* at 843. The court absolved Magna of liability as a used product dealer reasoning that no proof evidenced that it either knew or could have reasonably foreseen that the injury causing drum would be cut into trash containers by a purchaser. *Id.* at 841.

[110] *See* Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1226-27 (5th Cir. 1984)(assumption of risk jury instruction that deceased plaintiff knew or must have known that his maintenance actions would cause hopper to fall with him was supported by evidence); Alley v. Praschak Machine Co., 366 So. 2d 661, 665 (Miss. 1979)(plaintiff who suffered amputation of left arm assumed risk of working on skip hoist machine without knowing whether or not electric power was on).

[111] *See* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975)(under strict liability, Mississippi's contributory negligence law would preclude plaintiff's recovery only if he was sole proximate cause of his injury; otherwise amount of his recovery would be diminished by percentage of his negligence); Ford Motor Co. v. Matthews, 291 So. 2d 169, 175 (Miss. 1974)(under strict liability, plaintiff's foreseeable contributory negligence in starting tractor in gear was not bar to action).

[112] *See* Gray v. Manitowoc Co., 771 F. 2d 866, 869-70 (5th Cir. 1985)(common use of signalman to guide crane was evidence under § 402A that blind spot was patent defect which rendered crane not unreasonably dangerous under consumer expectation test); *cf.* Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 94-95, 140 So. 2d 558, 561 (1962)(pre-§ 402A case; manufacturer of oil rig not liable in negligence where defects were open and obvious).

[113] *See* Thomas v. Munson Mach. Co., 463 So. 2d 1044, 1047 (Miss. 1985)(summary judgment for manufacturer sustained on grounds punch press machine safe for intended use when left manufacturer's hands; owner's installation of electric motor and wiring without safety switch, contrary to manufacturer's instructions, absolved manufacturer of liability); Hatcher v. American Motors Corp., 241 So. 2d 147, 148 (Miss. 1970)(faulty installation of overload springs by automobile owner's brother was substantial change in product supporting jury verdict for manufacturers); State Stove Mfg. Co. v. Hodges, 189

product,[114] or merely a long passage of time between manufacture and injury.[115] Additionally, lack of prior accidents or product complaints may be asserted by a defendant.[116] The federal courts in cases arising under Mississippi law have recently recognized the government contractor defense,[117] as well as the successor corporation defense.[118]

The extensive conceptual similarities between negligence and strict liability in tort were sanctioned by the federal district court in *Fincher v. Ford Motor Co.*[119] thusly: ". . . it seems to this Court that the factors considered by Judge Gewin in a straight negligence case[120]

So. 2d 113, 121 (1966)(water heater manufacturer not liable where its product was not expected to and did not reach consumer without substantial change in condition in which it was sold), *cert. denied*, 386 U.S. 912 (1967).

[114] *See supra* note 87 and accompanying text.

[115] *See* Ford Motor Co. v. Broadway, 374 So. 2d 207, 211 (Miss. 1979)(safe usage of tractor in excess of ten years belies defective design or manufacture; court takes judicial notice that all mechanical things eventually wear out); Creel v. General Motors Corp., 233 So. 2d 105, 109 (Miss. 1970)(accelerator linkage defect could not be traced to automobile manufacturer after 30 months and 30,000 miles of safe use).

[116] *See* Fincher v. Ford Motor Co., 399 F. Supp. 106, 115 (S.D. Miss. 1975)(absence of claims during eleven year period regarding instant tractor model starting in gear was relevant to reasonableness of product design), *aff'd*, 535 F.2d 657 (5th Cir. 1976); Coleman v. Ford Motor Co., 240 So. 2d 607 (Miss. 1970)(lack of previous accidents from use of instant design of spindle arm created jury question as to reasonable safety of truck).

Although defendant may introduce the non-existence of prior complaints or accidents in his case in chief, he may prevent the plaintiff from introducing evidence of defendant's subsequent remedial repairs under Federal and Mississippi Rule of Evidence 407 only if the defendant does not controvert the feasibility of an alternative product design. *See* Grenada Steel Indus., Inc. v. Alabama Oxygen Co., 695 F.2d 883, 885-86 (5th Cir. 1983)(evidence that defendant marketed valves of different design subsequent to accident not admissible under Rule 407 because feasibility of different design not challenged by defendant), *cert. denied*, 466 U.S. 958 (1984); *cf.* Dixon v. International Harvester Co., 754 F.2d 573, 584 (5th Cir. 1985)(wire mesh screening and metal plate addition to crawler tractor cab admissible in strict liability in tort action to show feasibility of alternate design); Creel v. General Motors Corp., 233 So. 2d 105, 108 (Miss. 1970)(technical bulletin issued by defendant was admissible but jury warranted in finding it did not imply defective design).

[117] *See* Estate of Portnoy v. Cessna Aircraft Co., 612 F. Supp. 1147, 1152 (S.D. Miss. 1985)(government contractor manufacturer not liable for design defects when work performed in accordance with government specifications without negligence or willful misconduct).

[118] *See* Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174-77 (5th Cir. 1985)(continuity of relationship between defendant and its predecessor corporation which gives rise to defendant's duty to warn of latent dangers with "cherry picker" crane under continuity of enterprise theory is jury question).

[119] 399 F. Supp. 106 (S.D. Miss. 1975), *aff'd*, 535 F.2d 657 (5th Cir. 1976).

[120] The reference is to Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971), a negligent design case.

would apply as well to the doctrine of strict liability. He found that in the consideration of whether or not a product was reasonably safe in its design that the design must be measured against objective standards. Those most frequently applied he listed as: (1) the conformity of the design to the practices of other manufacturers in the industry *at the time of manufacture*; (2) the open and obvious nature of the alleged danger; and (3) the extent of the plaintiff's use of the product and the length of time involved in such use by the plaintiff and others prior to the injury without any harmful incident."[121]

III. Import of *Toliver* On Section 402A Design Defect Actions: A Move to Absolute Liability?

In view of the clear interrelation of the negligence-strict liability in tort doctrines in Mississippi case law, the question posed by dicta in *Toliver* is whether or not the development of strict liability in tort in Mississippi will forsake past patterns for imposition of a more absolute liability against manufacturers, particularly in the crucial area of design defect of reasonableness.[122] The uncertainty stems from the court's contradictory positions in *Toliver* regarding the relevancy of defendant's state of the art evidence.[123] To deem that defendant's state of the art evidence is irrelevant in a design defect action would be to move the Mississippi position significantly toward the absolute liability end of the section 402A spectrum.

Three of the four portions of the *Toliver* decision which form the basis for the query of this comment appeared in both the original unpublished opinion[124] and the modified published one.[125] First, the court in discussing the current state of the art in automobile design noted that a manufacturer had the duty to base his design choice on such factors as aerodynamics, cost and industry standards.[126] However, the court pointed out that these factors were relevant on the issues of product utility and of the applicable standard of care in a negligence

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[121] *Fincher*, 399 F. Supp. at 114.

[122] Weinberger posits that products liability cases fall into two categories: cases involving true strict liability such as mismanufactured or physically impure products and cases which directly or indirectly involve the concepts of reasonableness as found in defectively designed products. In the latter class of cases state of the art evidence should logically be admitted. Weinberger, *supra* note 17, at 308.

[123] *See supra* note 4.

[124] Toliver v. General Motors Corp., No. 55,647 (Miss. Nov. 6, 1985).

[125] The unpublished opinion was modified on denial of rehearing, February 12, 1986.

[126] *Toliver*, 482 So. 2d at 218.

action but were *meaningless* under Mississippi's strict liability law.[127] (Emphasis added). Secondly, the court rejected Dean Wade's approach which favors preservation of the strict liability doctrine for mis-manufactured products but would discard it in favor of the negligence theory in design and warning cases.[128] The Mississippi court posited that such distinctions "muddy the waters."[129] To clarify its own strict liability approach, the court modified its *State Stove* interpretation of "defective condition" and "unreasonably dangerous" as separate concepts.[130] It stated that in both manufacturing and design defect cases under section 402A the plaintiff now "must show that the product was defective *and* that its defective condition made the product unreasonably dangerous to him" under the consumer expectation test.[131] The third statement of the court, common to both opinions, is an elaboration of the plaintiff's burden of proof. The plaintiff "*may* introduce evidence of industry standards, to show deviation therefrom, or an alternate design, to show the feasibility thereof."[132] (Emphasis added).

A fourth significant portion of the *Toliver* opinion was altered in the modified opinion.[133] The original opinion stated, following its permissive nod to plaintiff to use feasibility and industry custom evidence, the following restrictions upon use of similar evidence by the defendant:

> The defendant may then offer evidence in rebuttal. The defendant may independently introduce evidence of the state of the art only if he attempts to qualify his product, under Comment k to Section 402A, as unavoidably unsafe. Compliance with industry standards suggests a standard of liability that is the antithesis of strict liability theory and runs contrary to the public policy behind liability. J. E. Beasley, *Products Liability*

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[127] *Id.*

[128] *Id.*, quoting Wade, *supra* note 36, at 837.

[129] *Toliver*, 482 So. 2d at 218.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Modification was in response to the petitioner General Motors' (appellee) motion for rehearing which objected, *inter alia*, to the advisory nature of the opinion on evidentiary issues which had not been briefed on appeal. Brief of Petitioner on Motion for Hearing at 1, Toliver v. General Motors Corp., 482 So. 2d 213 (Miss. 1985). Appeal was from the trial court's dismissal pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure for failure to state a claim on which relief can be granted. *Toliver*, 482 So. 2d at 214.

and the Unreasonably Dangerous Requirement, [sic] 394 (1981).[134]

The substituted opinion omitted all but the first quoted sentence and added a footnote to that first sentence. Relevant footnote 2 reads, "[i]t is noted that Sections 401, 402 and the comments thereto, of the Mississippi Rules of Evidence, effective January 1, 1986 relax and therefore broaden the scope of admissibility of all relevant evidence."[135]

While it is undisputed that the deleted portion of the original opinion is not law in Mississippi, the mind set of the court which it may reflect regarding a future shift to a more absolute liability for manufacturers in design defect actions under section 402A is awesome. One might argue that the substituted footnote points instead to the view that defendant's state of the art evidence will be freely admissible as in the past,[136] thus retaining Mississippi's current intertwining of negligence and strict liability concepts.[137] Such an argument is, however, blatantly contradicted by those portions of the original opinion retained in the modified version which reject negligence in favor of strict liability in design cases and which state that feasibility and industry standards — state of the art evidence — are meaningless in strict liability.[138] *Toliver* as it now stands provides no clear guidance to trial courts on the relevancy *vel non* of defendant's state of the art evidence.

The *Toliver* decision does make a definite, if questionably logical, pronouncement regarding the irrelevance of defendant's state of the art evidence on the issue of due care. The court stated that all the due care which a manufacturer takes in the design of his product is irrelevant given the shift in emphasis under section 402A from the conduct

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[134] Toliver v. General Motors Corp., No. 55,647, slip op. at 12 (Miss. Nov. 6, 1985).

[135] *Toliver*, 482 So. 2d at 218 n.2. Mississippi Rules of Evidence 401 and 402 read as follows:

RULE 401. DEFINITION OF "RELEVANT EVIDENCE":

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE: IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible.

[136] *See supra* notes 69-71 and accompanying text.

[137] *See supra* notes 93-121 and accompanying text.

[138] *See supra* notes 126-131 and accompanying text.

of the manufacturer to the performance of his product.[139] Yet under section 402A, as acknowledged in *Toliver*, the plaintiff must prove that the product as designed was in a defective condition *unreasonably* dangerous to him.[140] (Emphasis added). These two positions espoused by *Toliver* and section 402A reflect an irreconcilable analytical dilemma. The term "unreasonably" limits the liability of the seller, preserving him from the fate of an insurer of his product. "Unreasonably" within itself constitutes an external standard of due care by which "defective" is defined. Thus, despite the focus on the condition of the product as unreasonably dangerous, in the case of a deliberate design choice, it logically follows that the objective conduct of the seller created the condition of his product and is relevant.[141]

While the *Toliver* court rejected the relevancy of defendant's state of the art evidence on the due care issue, the court did not specifically address the admissibility of it on the issue of defectiveness. Numerous other jurisdictions which embrace positions similar to those of Mississippi have analyzed this question and found such evidence to be relevant on the defectiveness issue. Given the similarity of positions between these jurisdictions and Mississippi and the negligence-related concepts currently incorporated into Mississippi's strict liability doctrine, the Mississippi court could conceivably choose to follow the examples of its sister courts.[142]

Arizona, a jurisdiction which like Mississippi adheres to the consumer expectation test of defectiveness, has recently evolved an approach which admits defendant's state of the art evidence to show whether a product was defective and unreasonably dangerous. In the 1982 case of *Hohlenkamp v. Rheem Manufacturing Co.*,[143] the Court of Appeals of Arizona allowed defendant's evidence of unfeasibility of a proposed alternative design and of industry custom and standards to be introduced by expert witnesses.[144] The court found the evidence relevant in a strict liability design defect action to determine whether the

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[139] *Toliver*, 482 So. 2d at 217.

[140] *See supra* notes 31, 130-31 and accompanying text.

[141] Spradley, *supra* note 5, at 350-51.

[142] In a strict liability situation where state of the art evidence would be relevant to the issue of defectiveness but not to that of due care exercised by the manufacturer, one commentator recommends defense counsel utilize the multiple admissibility doctrine of Federal Rules of Evidence 105. Thus evidence which is admissible for one purpose but inadmissible for another can come in with a limiting jury instruction. Comment, *The State of the Art Defense in Products Liability: "Unreasonably Dangerous" to the Injured Consumer*, 18 DUQ. L. REV. 915, 931 (1980).

[143] 134 Ariz. 208, 655 P.2d 32 (1982).

[144] *Hohlenkamp*, 655 P.2d at 34-37.

defect was dangerous beyond the expectations of the ordinary consumer.[145] In 1985 the Arizona Supreme Court dealt with the difficulty inherent in the consumer expectation test when applied to complex designs about which the consumer cannot readily formulate expectations as to unreasonable danger. *Dart v. Wiebe Manufacturing, Inc.*[146] affirmed the consumer test for simple design cases but adopted a strict liability risk-utility analysis which focuses on the condition of the product when consumer expectations cannot be adequately defined.[147] The supreme court distinguished its risk-utility analysis from that applied to negligent design cases. The court reasoned that in negligence actions the analysis focuses on the manufacturer's knowledge at the time of production where the strict liability application incorporates both the manufacturer's knowledge at the time of manufacture and at the time of trial in light of the evidence.[148]

The *Dart* risk-utility analysis incorporates six of Dean Wade's seven factors.[149] *Dart* substitutes the element of common knowledge and normal public expectation of the danger, particularly for established products, for Wade's seventh factor, feasibility of the manufacturer spreading the loss. This substituted factor parallels section 402A, comment i[150] and appears to merely elaborate on the Wade factor regarding obviousness of the danger. Although the Mississippi Supreme

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[145] *Id.* at 35.

[146] 147 Ariz. 242, 709 P.2d 876 (1985).

[147] *Dart*, 709 P.2d at 881. *Dart* disapproved Brady v. Melody Homes Mfg., 121 Ariz. 253, 589 P.2d 896 (1978) which allowed a plaintiff to proceed only under a negligence theory when a risk-utility analysis was necessary. *Dart*, 709 P.2d at 882.

In addition to Arizona, other jurisdictions have attempted assimilations of the consumer and manufacturer approaches to defectiveness. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 435, 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978)(bifurcated test gives plaintiff option of proving design defect by consumer expectation test or by causation between design and injury if defendant unable to prove design benefits outweigh its risks); Allen v. Rodgers Mach. Mfg. Co., 268 N.W. 2d 830, 834-35 (Iowa 1978)(en banc)(consumer expectations formulated by a risk-utility balancing process define product defectiveness in Iowa); Estate of Ryder v. Kelly-Springfield Tire Co., 91 Wash. 2d 111, 587 P.2d 160, 164 (1978)(en banc) (Washington follows a buyer-oriented approach which shapes consumer expectations by incorporating factors of product cost, gravity of harm, costs and feasibility of safer alternatives, and other elements relevant to nature of particular product or defect); *cf.*, Back v. Wickes Corp., 375 Mass. 633, 378 N.E.2d 964, 970 (1978)(in warranty action fitness of motor home for ordinary purposes determined by jury weighing factors similar to those in negligence action; focus on product, not manufacturer's conduct, but nature of outcome essentially same).

[148] *Dart*, 709 P.2d at 881. The *Dart* approach is similar to that advocated by Keeton. *See supra* note 42.

[149] *Dart*, 709 P.2d at 879-80; *see supra* note 43 and accompanying text.

[150] *See supra* note 34.

Court has never formally acknowledged or adopted the risk-utility analysis in strict liability actions, it has impliedly done so, albeit in a piecemeal fashion. Three of the factors, utility of the product, availability of a safer design and the manufacturer's ability to improve safety without impairing utility or cost, are implicit in the plaintiff's proof of defectiveness through evidence of feasibility of an alternative design, non-compliance with industry standards,[151] and subsequent remedial repairs.[152] Defendant's evidence of lack of prior accidents or claims[153] incorporates the likelihood and seriousness of the injury factor. Defendant can likewise prove the plaintiff's contributory negligence,[154] assumption of the risk,[155] or unforeseeable misuse of the product,[156] *i.e.*, the user's ability to avoid danger. A sixth factor, the user's awareness of dangers due to their obvious nature or to warnings, bars plaintiff's recovery under the open and obvious defense.[157] Lastly, the feasibility of the manufacturer spreading the loss has been recognized by the Mississippi court as one policy basis for adoption of section 402A.[158] Therefore, it would appear that the Mississippi Supreme Court could logically, without undermining its current application of strict liability in tort, adopt an express risk-utility formula to evaluate complex design defects. Express recognition of these factors which are in essence presently determinative under section 402A in Mississippi would assure admissibility of defendant's state of the art evidence on the issue of defectiveness under a modified consumer expectation test.

Other jurisdictions which, like Mississippi, define state of the art in terms of feasibility, industry standards and perhaps industry custom, find this type of defendant's state of the art evidence relevant to the issue of defectiveness. For example, when state of the art is defined as feasibility and the plaintiff is required to prove defectiveness through the existence of a safer, practical alternative design, exclusion of the defendant's proof of infeasibility has been deemed untenable. In *Sutkowski v. Universal Marion Corp.*,[159] the Appellate Court of Illinois stated the principle aptly: "The possible existence of alternate designs introduces the feature of feasibility since a manufacturer's product can

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[151] *See supra* note 88 and accompanying text.
[152] *See supra* note 116.
[153] *See supra* note 116 and accompanying text.
[154] *See supra* note 111 and accompanying text.
[155] *See supra* note 110 and accompanying text.
[156] *See supra* notes 87, 114 and accompanying text.
[157] *See supra* note 112 and accompanying text.
[158] *See supra* note 76 and accompanying text.
[159] 5 Ill. App. 2d 313, 281 N.E.2d 749 (1972).

hardly be faulted if safer alternatives are not feasible."[160] In Mississippi, the plaintiff's use of feasibility evidence is permissive rather than mandatory as in Illinois; however, the underlying principle of fairness expressed by *Sutkowski* remains the same.

Mason v. Caterpillar Tractor Co.[161] is a 1985 application by a sister Illinois court of admissibility of defendant's state of the art evidence on the issue of defectiveness.[162] Expert testimony for the plaintiff during summary judgment proceedings opined that plaintiff's decedent was killed by a metal chip which severed from defendant's tractor track shoe grouser bar, because the bar lacked a sufficient depth of hardness and carbon content.[163] Defense experts countered that the alternative was infeasible because it would substantially affect the utility, reliability and durability of the track shoe.[164] *Mason* affirmed summary judgment for the defendant, in part because the speculative nature of plaintiff's expert testimony failed to establish a jury question on the defectiveness issue.[165] Most jurisdictions which follow Mississippi in incorporating notions of industry standards and custom within the state of the art definition hold that such evidence from defendant is admissible on the issues of defectiveness and fitness for an intended purpose.[166] Evidence of industry standards and custom is variously treated as either some evidence of or a rebuttable presumption

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[160] *Sutkowski*, 281 N.E.2d at 753. The court listed economy, effectiveness, practicality and technological possibility as elements of the present state of the art. *Id.*

[161] 139 Ill. App. 3d 511, 487 N.E.2d 1043 (1985).

[162] *See also* Laney v. Coleman Co., 758 F.2d 1299, 1302 (8th Cir. 1985)(defense evidence admissible to rebut proof that absence of low cost flame arrester rendered fuel can defective); West v. Johnson & Johnson Products, Inc., 174 Cal. App. 3d 831, 865, 220 Cal. Rptr. 437, 457 (1985)(feasibility of alternative tampon design part of manufacturer's burden under risk-utility analysis); Peterson v. Little-Giant Glencoe Portable Elevator Division, 366 N.W.2d 111, 113, 116 (Minn. 1985) (conflicting evidence on feasibility of alternative design of soil finisher farm implement presented jury question on product defectiveness); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 749 (Tex. 1980)(defendant's evidence of non-use of kill switch on bass boat relevant to defectiveness; not offered to show compliance with industry custom).

[163] *Mason*, 487 N.E.2d at 1046. Plaintiff's decedent was repairing the track shoe at the time of his death. He hit its grouser bar with a twenty-pound sledge hammer, causing a metal chip to fly off and penetrate his chest. *Id.*

[164] *Id.* at 1047. In addition, defense experts testified that other companies who manufactured track shoes used a very similar metallurgic content. *Id.*

[165] *Id.* at 1046-48. Plaintiff's expert had not tested his theory, could not assert that the changes could be made, and admitted the proposed changes would increase the propensity for brittle fracture, thus introducing a totally new danger. *Id.* at 1047. The *Mason* position on testing and other practical proof of an alternative design is shared by commentators and defense counsel groups. O'Donnell, *see supra* note 13, at 648.

[166] Spradley, *supra* note 5, at 355-63.

of non-defectiveness.[167] In the past, the Mississippi court has upheld admission of defendant's evidence of industry standards and custom in

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[167] Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978) (en banc) accords industry standards great weight on the issue of defectiveness. The court stated:

> These codes . . . are likely to be more probative than a single learned treatise or an expert opinion, as they represent the consensus of an entire industry. There is no motive for the formulators to falsify, and there is no danger that the standards will be subsequently altered or incorrectly remembered by a witness. Finally, since we require that the safety standards be introduced through an expert witness, the adverse party will have a fair opportunity to cross examine the expert on any inconsistencies, misrepresentations or other limitations on the standards. Given these guarantees of trustworthiness, we approve the admission of industry safety codes as substantive evidence on the strict liability issue of whether a product is in a "defective condition unreasonably dangerous."

Id. at 287; *see also* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 45 (Alaska 1979)(conformity to industry standards not defense to strict liability but may be considered in determination of defectiveness), *cert. denied*, 454 U.S. 894 (1981), *rev'd on other grounds*, Dura Corp. v. Harned, 703 P.2d 396 (1985)(industry standards relevant to fitness of product for ordinary purpose but have low probative value); Price v. Buckingham Mfg. Co, 110 N.J. Super. 462, 266 A.2d 140, 141 (1970)(evidence of conformity to industry practices is relevant to determine if product is reasonably fit for ordinary purposes for which it is sold); MICH. COMP. LAWS ANN. § 600.2946(1) (West 1986)(statute compliance with industry standards to be considered by trier of fact).

For jurisdictions which accord industry standards a rebuttable presumption status, see Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 268 N.W.2d 291, 294-95 (1978), *aff'd*, 414 Mich. 413, 326 N.W.2d 372, 379 (1982)(to establish prima facie case plaintiff must, *inter alia*, show noncomformance "with industry design standards, design guidelines established by authoritative voluntary association, or design criteria set by legislative or other governmental regulation . . . ."); Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863, 868 (1975)(custom or usage may be conclusive evidence of non-defectiveness when plaintiff produces no evidence to show that product was not reasonably safe); KY. REV. STAT. ANN. § 411.310(2) (Baldwin 1981)(compliance with standards or state of art at time of design and manufacture is rebuttable presumption that product was not defective).

By comparison, five states have enacted statutes which make compliance with governmental standards and administrative regulations prima facie proof of non-defectiveness. *See* COLO. REV. STAT. § 13-21-403(2) (Supp. 1986)(compliance with applicable code, standard or regulation creates rebuttable presumption that product not detective); KAN. STAT. ANN. § 60-3304(a) (1983)(if in compliance with legislative or administrative safety standards, product is deemed not defective; rebuttable by showing by preponderance "that a reasonably prudent product seller could and would have taken additional precautions"); N.D. CENT. CODE § 28-01.1-05(3) (Supp. 1985)(rebuttable presumption product free from any defect if in compliance with "government standards established for that industry"); TENN. CODE ANN. § 29-28-104 (1980)(rebuttable presumption product not unreasonably dangerous if in compliance with any federal or state statute or administrative regulation); UTAH CODE ANN. § 78-15-6(3)(1987) (rebuttable presumption product free from any defect or defective condition if in compliance with governmental standard).

strict liability actions, according it some probative value.[168] Should Mississippi later change this longstanding practice and embrace its position in its original *Toliver* opinion which unequivocally rejects defendant's industry standards and custom evidence, the court will be adopting a minority viewpoint.[169] Additionally, such a reversal would negate an earlier implied position of the court in *Walton v. Chrysler Motor Corp.* regarding the admissibility of governmental standards promulgated by the automobile industry. The *Walton* court predicated its rationale for adoption of the second accident doctrine in part on the inability of the judiciary to set standards of duty or reasonableness of design and to police industry compliance with detailed product designs.[170] The court reasoned that the task of formulating and implementing automotive design criteria lay instead with the legislative branch of government.[171] Thus, now that Mississippi has rejected the second accident doctrine through *Toliver*, it seems logical that the court could place heavy reliance on extensive existing governmental standards[172] to determine the reasonableness of design. The argument can be extended to posit that in the formulation of these government standards feasibility factors were considered. Therefore, defendant's state of the art evidence in both its feasibility and government standards aspects should be relevant on the issue of defectiveness. Likewise, industry standards which incorporate feasibility and custom should be admissible.

IV. Conclusion

Confusion within *Toliver* dicta on evidentiary matters has brought Mississippi strict liability in tort law to a significant crossroads. It is unclear whether the supreme court in subsequent decisions will choose to move Mississippi toward a more absolute version of strict liability in tort. An explicit ruling to limit or bar defendant's state of the art evidence as irrelevant on the issue of defectiveness would shift the equi-

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[168] *See supra* notes 69-71.

[169] A few courts refuse to admit industry custom and practice evidence contending that as proof of a manufacturer's due care or knowledge it is irrelevant in a strict products liability action. *See* Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 815 (9th Cir. 1974)(knowledge of hazard which employer failed to communicate to employee-plaintiff irrelevant); American Cyanamid Co. v. Ray, 466 So. 2d 1079, 1083 (Fla. Dist. Ct. App. 1984)(compliance with industry guidelines regarding warning on toxicity of chemical grout are irrelevant in strict liability suit).

[170] *Walton*, 229 So. 2d at 573.

[171] *Id.*

[172] *See supra* note 22 and accompanying text.

ties under section 402A decidedly toward the plaintiff. Such a move would be particularly unjust in design defect cases. Much of the difficulty faced by the court stems from the analytical inconsistencies present in the language of section 402A. Semantically one may neatly state that a product is in a "defective condition unreasonably dangerous" if, focusing on the product, it is more dangerous than an ordinary consumer would expect despite all possible care taken by the manufacturer. However, in many design defect cases the concept is unworkable analytically without shifting policy considerations totally in favor of the plaintiff. If a manufacturer's conscious design choice for his product is to be adjudged "unreasonably dangerous," the criteria for this determination must include factors affecting the manufacturer's choice of design for his product. It is additionally important to factor in the user's knowledge of the danger and the precautions he could have taken in using the product. Professor Wade's seven risk-utility factors provide an appropriate and concrete external standard by which to make this determination in the strict liability context.

Since Mississippi had implicitly incorporated each of Wade's seven factors into its prior applications of section 402A, the supreme court would not be forging new law by expressly adopting these factors as determinative criteria in its test for product defectiveness. At minimum, the Mississippi court should explicitly rule in a future appropriate case[173] that defendant's state of the art evidence is relevant on the issue of defectiveness. The court will be wise to give careful consideration to its policy statement in *Toliver*, "[t]he rationale for imposition of this *absolute* liability . . ."[174] (emphasis added), to determine whether use of the word absolute was a mere slip of the pen or a portent of Mississippi's future course under section 402A.

Marian Alexander

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[173] The court will not have the opportunity to address the question on a later appeal of *Toliver* as it was settled and dismissed on October 22, 1986.

[174] *See supra* note 79 and accompanying text.

THE GOVERNMENT CONTRACTOR DEFENSE: AN ANALYSIS OF ITS APPLICATION BY THE COURTS

I. Introduction

In recent years, many product liability actions have been brought against manufacturers of military products by servicemen who have been killed or injured during the course of military activities as a result of design defects in military products. These injured servicemen seek recovery solely against the manufacturer, since an action against the government is barred by the doctrine of sovereign immunity. The manufacturer's dilemma stems from the fact that, in contracting with the government for military products, the manufacturer normally has neither the right nor the opportunity to alter the product and merely produces it in compliance with government specifications. To alleviate this burden, almost every court to consider the matter has either adopted or recognized the availability of an affirmative defense, called the government contractor defense.[1] This defense virtually eliminates liability of the defendant-manufacturer upon proof that certain specific elements were met. Different circuit courts have analyzed how the government (or military) contractor defense applies to and affects military suppliers in products liability litigation. While the individual circuits have stated different historical backgrounds and reached different re-

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[1] The government contractor defense has been recognized to some extent by almost every court that has considered the matter. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986)(defective military aircraft); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985)(military aircraft); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985)(Army cargo carrier); In re Air Crash Disaster at Mannheim, Germany, 769 F.2d 115 (3d Cir. 1985)(defective helicopter); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985)(military front-end loader); Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1985)(helicopter); Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036 (5th Cir. 1984)(recognized, but court refused to apply under state law); McKay v. Rockwell Intl. Corp., 704 F.2d 444 (9th Cir. 1984)(defective aircraft); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982)(chemical defoliant used by military), *modified*, 597 F. Supp. 740, 849 (E.D.N.Y. 1984); Johnston v. United States, 568 F. Supp. 351, 353-54 (D. Kan. 1983)(radioactive compounds on faces of aircraft instruments); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983) (defective design of flight control system); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805, 75 N.J. 616 (1977) (army jeep vehicle); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980) (field kitchen dough mixer). *But cf.*, Nobriga v. Raybestos-Manhattan, Inc., 67 Hawaii 157, 683 P.2d 389, 392 (1984)(rejected defense in asbestos case).

sults, they amazingly have agreed upon a substantial amount of the rationale behind the government contractor defense. The focus of this comment is to describe and explain the background of the various defenses discussed in the circuit courts, to distinguish the different decisions, and to show how they can be interwoven to create a viable defense.

This comment will begin with the evolution of the government contractor defense, which flows from two traditionally recognized defenses in tort law, the contract specifications defense[2] and the government contract defense.[3] The discussion of elements that make up the defense will be centered around three decisions which have established definite guidelines to be followed for the application of the defense: *In re Agent Orange Products Liability Litigation*,[4] *McKay v. Rockwell International Corp.*,[5] and *Shaw v. Grumman Aerospace Corp.*[6] These decisions state differing elements which render consistent decisions at the trial level virtually impossible unless the court understands the elements of all three decisions and strictly follows those elements in application of the defense.

II. Historical Underpinnings of the Defense

It has been stated that the government contractor defense resulted from the integration of two distinctly separate traditional defenses.[7] The first of these, the contract specification defense, is based on ordinary negligence principles and provides that where a contractor built a product in accordance with design specifications provided by another, whether the government or a private party, then the contractor will not be held liable unless the product's dangerous and defective nature is obvious to him.[8] The second, the traditional government contract defense, allows the contractor to share the government's immunity when it manufactures the product according to government-provided designs and specifications.[9]

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[2] *See infra* notes 10-13 and accompanying text.

[3] *See infra* notes 14-68 and accompanying text.

[4] 534 F. Supp. 1046 (E.D.N.Y. 1982); *see infra* notes 69-77 and accompanying text.

[5] 704 F.2d 444 (9th Cir. 1983); *see infra* notes 78-98 and accompanying text.

[6] 778 F.2d 736 (11th Cir. 1985); *see infra* notes 99-113 and accompanying text.

[7] Johnston v. United States, 568 F. Supp. 351, 353 (D. Kan. 1983).

[8] *Id.* at 354; *see* Restatement (Second) of Torts § 404 comment a (1965)(rule of negligence when constructing or repairing chattels).

[9] *Johnston*, 568 F. Supp. at 356.

A. Contract Specification Defense

In general, the contract specification defense provides that a contractor may avoid liability for the defective design of a product it manufactured if the contractor complied with government specifications, the injury was attributed to a defect in the specifications, and the specifications were not so obviously defective that a prudent contractor would have refused to follow them.[10]

The defense presumes that the contractor does not possess the knowledge necessary to evaluate, or reevaluate, the specifications provided by the owner.[11] However, in specific instances where the contractor possesses special knowledge, the contractor will be held to a higher standard of care.[12] Thus, the defense is based upon negligence princi-

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[10] W. Prosser, The Law of Torts § 681 (4th ed. 1971); Restatement (Second) of Torts § comment a (1965). Courts have concluded that a contractor has a duty not to continue or to at least issue a warning when there is a danger in the product that is apparent or peculiar. *See, e.g.*, McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592, 595 (Ky. 1980)(products liability action against manufacturer of aerial boom).

The contract specification defense originated in Ryan v. Feeny & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321, 322 (1924), where a government employee was killed when a building canopy, constructed for the United States government by a private contractor, collapsed under a heavy snow fall. In denying recovery, the New York Court of Appeals stated that a "builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury." *Id.* at 321-22. The defense has since been successfully raised by contractors performing federal, state and private contracts. *See, e.g.*, Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973)(private contract); Person v. Cauldwell-Wingate Co., 187 F.2d 832 (2d Cir. 1951)(federal contract); McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592 (Ky. 1980)(state contract).

However, the Eleventh Circuit in Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 (11th Cir. 1985), stated that the "contract specifications defense" was not actually a defense, but was a standard of care and the manufacturer of the product was not held to the same standard as the product's actual designer. *See also* Bynum v. FMC Corp., 770 F.2d 556, 563 (5th Cir. 1985)(same). The manufacturer could only be liable where the specifications for the products' design were clearly defective and the reasonably prudent contractor would recognize the products' dangerous propensities. *Shaw*, 778 F.2d at 739.; *Bynum*, 770 F.2d at 563. However, the contract specification defense was not asserted in *Shaw* and its application in that case was not considered. *Shaw*, 778 F.2d at 739.

[11] *See* Davis v. Henderlong Lumber Co., 221 F. Supp. 129, 133-34 (N.D. Ind. 1963)(contractor absolved of liability where his lack of experience necessitated compliance with construction and installation plans); Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321, 322 (1924)(architect responsible for discovery of adequate building support in construction plans; design defect not sufficiently obvious to put average contractor on notice).

[12] *See, e.g.*, Person v. Cauldwell-Wingate Co., 187 F.2d 832, 836-37 (2d Cir.)(manufacturer held to higher standard of care when he has special knowledge or

ples and should be denied only where the reasonably competent contractor realizes that his product could be dangerously unsafe.[13] An ordinary contractor may rely on the plans and specifications submitted

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expertise), *cert. denied*, 341 U.S. 936 (1951).

[13] Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983).

The Fifth Circuit in Challoner v. Day & Zimmerman, 512 F.2d 77, 83 (5th Cir.), *vacated and remanded for misapplication of conflict of law rules*, 423 U.S. 3 (1975), rejected the contract specification defense in a strict liability action. In *Challoner* one serviceman was killed and another injured when a howitzer round prematurely exploded during combat. *Id.* at 78. The plaintiffs brought the action under a theory of strict liability and won a judgment. *Id.* The defendant-manufacturer contended, on appeal, that the shell was designed exclusively by the government and therefore the contract specification defense should have been applied to preclude recovery. *Id.* at 82. The court rejected the manufacturer's contention and stated that under the theory of strict liability the defendant was liable where the product left the defendant's control in the defective condition. *Id.* at 83.

In comparison to *Challoner*, the Supreme Court of Kentucky in McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592, 595 (Ky. 1980), affirmed the trial court's directed verdict in favor of a manufacturer. In *McCabe*, the plaintiff fell through the open side of the bucket of an aerial boom and sued under theories of negligence, strict liability, and breach of warranty. *Id.* at 593. The court held that the standard of liability for a defective design was essentially the same under theories of strict liability and negligence; thus, the contract specification defense even barred recovery for design defects in strict liability actions. *Id.* at 594-95.

Products liability actions are normally brought under three theories of recovery: negligence, strict liability, and breach of warranty. W. PROSSER, THE LAW OF TORTS § 131, at 678 (5th 1984). Under a negligence theory all manufacturers are held to a standard of reasonable care, and the negligent act occurs when there is a violation by the manufacturer of his duty to use reasonable care. *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916)(manufacturer of automobile with defective wheel held liable to ultimate purchaser). Under the theory of strict liability, the plaintiff must prove that the product was in a defective condition unreasonably dangerous to the user at the time of sale. RESTATEMENT (SECOND) OF TORTS § 402A (1979); *see, e.g.*, Greeman v. Yuba Power Prod. Inc., 377 P.2d 879, 900 (Cal. 1962). Also, the Federal Tort Claims Act, *see infra* notes 22-31 and accompanying text, does not permit an individual the right to bring a strict liability claim against the government. *See* Laird v. Nelms, 406 U.S. 797, 797-98 (1972)(FTCA only permits recovery for negligent or wrongful act or omission); 28 U.S.C. § 1346(b) (1982)(injury or loss must be caused by negligent or wrongful act or omission). Under a breach of warranty theory, the plaintiff needs only to prove that the product was defective at the time of the sale, that an express or implied warranty existed, and that some injury resulted from the defect. *See* MISS. CODE ANN. §§ 75-2-314 to -315 (1972)(Mississippi UCC warranty statutes). Courts have stated that the modern government contractor defense applies to design defect cases based on negligence or breach of warranty theories. Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); Tillett v. J.I. Case Co., 756 F.2d 591, 597 n.3 (7th Cir. 1985)(; Brown v. Caterpillar Tractor Co., 696 F.2d 246, 253 (3d Cir. 1982). *Cf.* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983)(government contractor defense as applied to theory of strict liability).

to him by another, unless those plans and specifications are so clearly defective that a contractor of reasonable prudence would not follow them.

B. Government Contract Defense

The government contract defense[14] has evolved along with and is similar to the contract specification defense.[15] The defenses are related in that both protect a contractor from being liable when he has followed the specifications set forth in the contract.[16] However, the government contract defense is not based on principles of negligence or strict liability, but rather allows the contractor to share the government's immunity from suit on grounds of public policy.[17]

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[14] This traditional defense has been identified by various courts by different names, including government agency defense. *See* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986)(government contractor defense); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 (11th Cir. 1985)(government agency defense); Tillett v. J. I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985)(government contract defense); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 448 (9th Cir. 1983)(government contractor defense); Merritt, Chapman & Scott Corp., v. Guy F. Atkinson Co., 295 F.2d 14, 15-16 (9th Cir. 1961)(government contract defense); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 792 (E.D.N.Y. 1980)(same). Essentially, each of the above cases uses different terms to identify the evolution of the same defense. Therefore, for the purpose of this comment, the historical background will be identified by the term "government contract defense" while the current application to products liability actions involving military products will be referred to as the "government contractor defense." However, later cases speak of the government contractor defense as the combination or evolution of two separate and distinct theories — contract specification defense and government contract defense — which are no longer viable under the context of modern product liability litigation. Bynum v. FMC Corp., 770 F.2d 556, 563 (5th Cir. 1985).

Also, the government contractor defense, as it is referred to in modern products liability litigation involving military contractors, has been identified as the military contractor defense. *See, e.g.*, Dowd v. Textron, Inc., 792 F.2d 409, 411 (4th Cir. 1986); Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986); *Shaw*, 778 F.2d at 738-39, 39 n.3, and the government contract defense, *Agent Orange*, 506 F. Supp. at 792. Essentially, these terms are interchangeable and no separate and unique meaning has been attached to any term.

[15] *See supra* notes 7-9 and accompanying text for a discussion on the interrelation of the two defenses.

[16] Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961).

[17] *See infra* notes 58-59 and accompanying text.

1. Sovereign Immunity — Federal Tort Claims Act — *Feres* and *Stencel* Doctrine

The government contractor defense is essentially a by-product of the doctrine of sovereign immunity. That doctrine was originally premised on the English perception that the king governed by the grace of God and therefore could do no wrong.[18] Thus legal actions against the ruling government[19] were barred. In the early 1800s, the United States Supreme Court incorporated the doctrine of sovereign immunity into American law.[20] This American version was based on the concept that a private citizen would not be allowed to seek legal relief against the federal government without the consent of the government.[21] However, Congress expressly circumscribed the scope of sovereign immunity in America by enacting the Federal Tort Claims Act (hereinafter referred to as FTCA) in 1946.[22]

In essence, the FTCA operates as a partial waiver of the federal

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[18] 86 CONG. REC. 12,018 (1940)(statement of Rep. Celler); RESTATEMENT (SECOND) OF TORTS ch. 45A special note (1979); Pound, *The Tort Claims Act: Reason or History?*, 30 NAT'L A. CLAIMANTS' COUNS. AM. L.J. 400, 406 (1964). *See generally* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 458-59 (3d ed. 1923)(discussing genesis of sovereign immunity); Parker, *The King Does No Wrong - Liability for Misadministration*, 5 VAND. L. REV. 167, 167-68 (1952)(discussing origins of sovereign immunity and suggested inception of doctrine in Roman law).

[19] W. PROSSER, THE LAW OF TORTS § 131, at 1033 (5th ed. 1984); *see* Feres v. United States, 340 U.S. 135, 139 (1950)(doctrine determined crown immune from suit); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821)(no suit may be prosecuted against United States without its consent); *see also* Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850)(doctrine that United States may not be sued unless it consents); United States v. McLemore, 45 U.S. (4 How.) 284, 288 (1846)(private citizen may not sue United States without consent). *See generally* RESTATEMENT (SECOND) OF TORTS § 895A (1979)(government immune from suit unless it consents).

[20] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821)(no suit may be commenced or prosecuted against United States); *see also* United States v. Lee, 106 U.S. 196, 207 (1882)(United States cannot be sued in any court, except where Congress has provided for such suit); Gibbson v. United States, 75 U.S. (9 Wall.) 269, 275-76 (1868)(Court held government immune from tort liability). *See generally*, 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 51, at 2-5 n.12 (1985)(discussing justification and harshness of sovereign immunity).

The most commonly asserted explanation of sovereign immunity was pronounced in Kawananakoa v. Polyblank, 205 U.S. 349 (1907), where the Court stated there was no basis to assert a legal right as against the government that enacted the law and on whose authority the right was dependent. *Id.* at 353; RESTATEMENT (SECOND) OF TORTS § 895A comment a (1979).

[21] W. PROSSER, THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

[22] Ch. 753, 60 Stat. 842 (1946)(codified as amended in scattered sections of 28 U.S.C.).

government's comprehensive immunity from liability.[23] By enacting the FTCA, Congress effectively gave its consent for the federal government to be sued in tort.[24] Thus, the FTCA allows individual citizens to seek recovery from the government for tortious acts committed by the government or its agents, which result in injury to that individual.[25] However, the FTCA contains several statutory exceptions,[26] and the courts have also enunciated several judicial exceptions.[27] Where an action falls within one of these exceptions, the doctrine of sovereign immunity remains intact and the court may not hear the case. Three primary exceptions preclude products liability actions against the government. First, under section 2680(a) of the FTCA, the federal gov-

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[23] 28 U.S.C. § 1346(b) (1982). The FTCA essentially provides that the government could be liable for monetary damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any governmental employee while acting within the scope of his office or position, under circumstances where a private individual would have been liable to the claimant according to the law of the place where the act or omission occurred. *Id.*

[24] Feres v. United States, 340 U.S. 135, 140 (1950); RESTATEMENT (SECOND) OF TORTS § 895A comment b (1979). As noted in the text above, prior to the enactment of the FTCA, there was no existing administrative or judicial remedy against the United States government. *See supra* notes 18-21 and accompanying text; 1 L. JAYSON, *supra* note 20, § 51 at 2-3. Therefore, in order for a private citizen to satisfy a claim against the government, it was necessary for the individual to petition for congressional relief through the enactment of a private bill. *Feres*, 340 U.S. at 140. The enormous quantity of private bills and the inept factual determination process of Congress compelled Congress to submit the adjudication of tort claims to the courts. *Id.* For example, prior to the FTCA, if a tort had been committed against a person, and the perpetrator was an ordinary individual or corporation, the wrongdoer could be brought to justice and held accountable; but where the wrongdoer was an officer or employee of the federal government the wrongdoer would escape punishment, and the victim would lose compensation, under the veil of sovereign immunity. *Id.* at 139-40. The paramount aim of Congress in enacting the FTCA was to provide a remedy to parties who had previously been without relief. *Id.* at 140. Thus, the FTCA provided a mechanism whereby the tremendous burden of private tort claims was removed from Congress and placed within the realm of judicial review, thereby providing a definite and certain set of guidelines that may be followed by the courts with consistency in rendering relief against the government. *See generally* Pound, *supra* note 18, at 409 (discussing history and rationale of FTCA).

[25] *Feres*, 340 U.S. at 140.

[26] *See* 28 U.S.C. § 2680(a)-(n) (1982)(complete list of FTCA statutory exceptions).

[27] *See, e.g., Feres*, 340 U.S. at 144-45 (denied recovery for death of serviceman because it was incidental to military service); *see infra* notes 29-52 and accompanying text; *see also* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671 (1977)(manufacturer may not recover in indemnity action against United States where injured party is serviceman); Laird v. Nelms, 406 U.S. 797 (1972)(FTCA does not permit strict liability claims against the government); Preferred Ins. Co. v. United States, 222 F.2d 942, 948 (9th Cir.) (claim for property damage incurred incident to military service not permitted by FTCA), *cert. denied*, 350 U.S. 837 (1955).

ernment is not subject to claims which arise out of discretionary actions taken by the government or its agents.[28] Second, a judicial exception has provided that a cause of action can not be brought against the United States based on strict tort liability.[29] A third exception was enunciated in *Feres v. United States*,[30] where the Supreme Court construed the FTCA to bar the claims of military personnel who sustained injuries while in the course and scope of their duties.[31]

In *Feres*, the Court held that the federal government's claim of sovereign immunity from tort actions under the FTCA was not waived in actions by servicemen to compensate for injuries they received due to the negligent acts of other military personnel.[32] The plaintiffs in *Feres*, while on active duty, allegedly sustained injuries as a result of the negligence of others in the military.[33] The Court relied on three

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[28] 28 U.S.C. § 2680(a) (1982). The FTCA based the discretionary function exception on the concept of constitutional separation of powers, in order to guarantee that government officials could carry out policy decisions free from judicial interference. Payton v. United States, 636 F.2d 132, 143 (5th Cir. 1981); *see, e,.g.*, Dalehite v. United States, 346 U.S. 15, 35-36 (1953)(Court concluded discretionary function included decisions made by administrators when creating plans and specifications of operations); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965)(imposing liability on contractor who followed government plans would circumvent discretionary function exception). *See generally* Note, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1033-35 (1981)(elaborating on *Dalehite* definition of discretionary function).

[29] Laird v. Nelms, 406 U.S. 797, 798-99 (1972). The Court in *Laird* held that claims against the government were not allowed based on a theory of strict or absolute liability for ultrahazardous activities; the FTCA only permitted recovery for a "negligent or wrongful act or omission." *Id.*

[30] 340 U.S. 135 (1950).

[31] *Id.* at 146.

[32] *Id.* Prior to *Feres*, the Supreme Court in Brooks v. United States, 337 U.S. 49, 51-52 (1949), held that two servicemen could recover damages under the FTCA, where their injuries were not incident to nor caused by their military service. The plaintiffs in *Brooks* were military personnel who were injured, while off duty, when a government vehicle negligently collided with their vehicle. *Id.* at 50. The *Brooks* Court concluded that since the plaintiffs were off duty the injuries sustained were not suffered incidental to service in the military and they could recover monetary damages from the government. *Id.* at 52. However, the *Feres* Court was quick to distinguish *Brooks* on the basis that the injury to the plaintiffs in *Brooks* did not occur due to his military duty and thus the holding in *Brooks* was not comparable to that in *Feres*. *Feres*, 340 U.S. at 146.

[33] *Feres*, 340 U.S. at 138. The Court consolidated three cases for review in *Feres*. *Id.* at 136. Plaintiff Feres perished in a fire which consumed his barracks. The fire was caued by a defective heating plant which allegedly was known or should have been to be unsafe. *Id.* at 136-37. During an abdominal operation, surgeons discovered a towel marked "Medical Department U.S. Army" in the body of plaintiff-Jefferson. *Id.* at 137. Plaintiff-Griggs allegedly died as a result of negligent medical treatment by military surgeons. *Id.*

major reasons for denying a serviceman's suit against the government: first, that the relationship between the government and the members of its armed forces is uniquely federal in character;[34] second, that the FTCA provided for the federal government to be liable " . . . in the same manner and to the same extent as a private individual under like circumstances . . .;"[35] and third, that the availability of veterans' benefits to military personnel sufficiently compensated those injured.[36] Therefore, the *Feres* doctrine established that under the FTCA the government retained the right to assert sovereign immunity with respect to injuries which arose out of or were in the course of an activity incident to service in the armed forces.[37]

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[34] *Id.* at 143; *see* United States v. Standard Oil Co., 332 U.S. 301, 305 (1947)(scope, nature, legal incidents and consequences of relationship between government and servicemen derived from federal sources and governed by federal authority). The Court in *Feres* determined that it was not rational to have the government's liability to the injured serviceman dependent on the serviceman's location at the time of the injury. *Feres*, 340 U.S. at 143. *But cf.* United States v. Muniz, 374 U.S. 150, 161 (1963)(Court held federal prisoner may sue under FTCA although his recovery was affected by different state laws).

[35] *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674 (1982)). Thus, under *Feres* the Supreme Court determined that in this situation the government would not be treated as a private person would under like circumstances. Ordinarily, in the situation where an individual provides reasonably precise design specifications to a manufacturer and the specifications are followed but result in a defective product, rendering the manufacturer liable to the ultimate user, then the liabiltiy will eventually rest with the individual whether through contribution or indemnity. Asselta & Fitzpatrick, *Government Contract Defense*, 28 TRIAL LAW. GUIDE 1, 3-4 (1984).

The Court in *Feres* added that no American court had ever allowed a soldier to recover against the government or his officers under a negligence theory. *Feres*, 340 U.S. at 141.

[36] *Feres*, 340 U.S. at 144-45; *see* 38 U.S.C. § 101-5228 (1982)(compensation plan for veterans). *But see* United States v. Muniz, 374 U.S. 150, 160 (1963)(presence of compensation system does not preclude suit for negligence). The *Feres* Court compared the benefits received by the plaintiffs from the Veterans' Administration with similar recoveries provided by the workers compensation statutes of most states. *Feres*, 340 U.S. at 145.

[37] *Feres*, 340 U.S. at 146. *Cf.* United States v. Brown, 348 U.S. 110, 112-13 (1954)(held FTCA permitted recovery for former serviceman with injury not sustained on active duty); Brooks v. United States, 337 U.S. 49, 51-52 (1949)(FTCA permitted recovery for serviceman's injury not caused by nor incident to service). The Court in Untied States v. Brown, 348 U.S. 110, 112-13 (1954), distinguished *Brooks* from *Feres* and determined that the FTCA allowed the plaintiff to maintain an action against the government because the injury sustained by the plaintiff in *Brooks* was not held to be incident to military service. Professor Jayson summarized the incident-to-service concept as follows: if the serviceman's injury or loss, when viewed in all the surrounding circumstances, has a real and substantial relationship to his military service, it will be regarded as incident to service and consequently barred under the *Feres* doctrine. 1 JAYSON, HANDLING FEDERAL TORT CLAIMS § 155.02 at 5-66; *see also* Healy v. United States, 192 F.

The Supreme Court extended the *Feres* doctrine in *Stencel Aero Engineering Corp. v. United States*,[38] holding that an indemnity action against the United States could not be maintained under the FTCA.[39] In *Stencel*, the plaintiff was severely injured when the ejection system of his military aircraft malfunctioned during an in-flight emergency.[40] The defendant-manufacturer filed a cross-claim for indemnity against his co-defendant, the federal government,[41] since the system was manufactured pursuant to government specifications.

The *Stencel* Court reviewed *Feres* and found that that decision was based on three factors:[42] (1) the distinct federal character of the relationship between the federal government and its military personnel;[43] (2) the Veterans' Benefits Act was the exclusive remedy of injured servicemen with respect to governmental negligence;[44] and (3)

Supp. 325, 327 n.8 (S.D.N.Y.)(special relationship of soldier-military includes those torts that are so closely related to it so as to be deemed incident to such duty, even though outside course of active duty), *aff'd*, 295 F.2d 958 (2d Cir. 1961).

[38] 431 U.S. 666 (1977).

[39] *Id.* at 673-74. In 1951, the United States Supreme Court decided a case that conflicted with its earlier holding in *Feres*. In United States v. Yellow Cab Co., 340 U.S. 543, 556-57 (1951), the Court held that the FTCA permitted a joint tortfeasor defendant to implead the United States for contribution as a third party defendant. Thus, not until *Stencel*, by holding that third party claims against the government were barred, did the Court resolve the "tension between *Feres* and *Yellow Cab*." *Stencel*, 431 U.S. at 670.

[40] *Stencel*, 431 U.S. at 668. Plaintiff brought this action against Stencel Aero Engineering Corp. (Stencel) and the United States government as co-defendants, alleging individual and joint negligence in the design of the ejection system. *Id.* The United States provided Stencel with the "specifications, requirements, and components" which were to be followed. *Id.*

[41] *Id.* Actually, there was no contract between Stencel and the United States. *Id.* at 667-68 n.2. The defendant-manufacturer contracted with North American Rockwell Corp., the primary contractor of the military aircraft, to supply the ejection system for the aircraft. *Id.* The indemnity claim was based on Missouri law. *Id.*

[42] *Id.* at 671.

[43] *Id.* at 672. In applying the first element of the *Feres* rationale, the Court determined that "[t]he relationship between the government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers." *Id.* The Court went on to include in this first factor that the locality or situs of the alleged negligence should not affect the government's liability to the serviceman. *Id.* at 671.

[44] *Id.* at 671. The Court viewed a recovery under the Veterans' Benefits Act as " a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government." *Id.* Thus, in applying the second *Feres* element, the Court determined that compensation provided by the Veterans Benefits Act, 38 U.S.C. §§ 101-5528 (1982), provided an upper limit of liability for service-related injuries and to permit the indemnification claim by the petitioner would undermine this limitation of liability, thereby frustrating the intent of the

the effect that a suit by a member of the military would have on the government.[45] The Court held that the rationale of *Feres* prohibited a third party from recovering in an indemnity action against the federal government.[46] However, it should be noted that in *Stencel* the liability of the manufacturer was not before the Court, merely the indemnity action.[47]

Since *Stencel*, it has become apparent that the effect of military discipline is the primary justification for the *Feres-Stencel* doctrine. Recently, in *United States v. Shearer*,[48] the Court specifically stated that the other factors in the *Feres* and *Stencel* decisions were "no longer controlling"[49] and the essential issue has become "whether the

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Act. *Id.* at 672-73. The Court reasoned that to allow an indemnity action against the government "would be to judicially admit at the back door that which has been legislatively turned away at the front door." *Id.* at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)).

Other courts interpreting *Stencel* have held that the Veterans Benefits Act was the exclusive remedy available for injured servicemen regardless of the action. *See* Carter v. City of Cheyenne, 649 F.2d 827, 830 (10th Cir. 1981)(compensation under Veterans Benefit Act was sole remedy for service connected injuries); United States v. Lee, 400 F.2d 558, 562-63 (9th Cir. 1968)(availability of administrative compensation precluded tort action by government employees injured in course of their duties), *cert. denied*, 393 U.S. 1053 (1969).

[45] *Stencel*, 431 U.S. at 671. This factor was first pronounced in United States v. Brown, 348 U.S. 110, 112 (1954), where the Court concluded that to allow the maintenance of suits such as *Feres* to question the actions of military authorities would adversely affect military discipline, a result which the Court would not permit. The factor stated in *Brown* was based on the rationale that, in a situation similar to *Feres*:

> the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on [military] discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.

Brown, 348 U.S. at 112.

In *Stencel*, the Court went on to conclude that whether the action was brought directly against the government or through an indemnity action "[t]he trial would 'involve second guessing military orders, and would . . . require members of the Armed Services to testify in court as to each other's decisions and actions.' " *Stencel*, 431 U.S. at 676-77.

[46] *Id.* at 673-74.

[47] *Stencel*, 431 U.S. at 668-69.

[48] 105 S. Ct. 3039 (1985). The Court in *Shearer* narrowed the controlling requirements of the *Feres-Stencel* doctrine. *Id.* at 3041. This suit was filed against the United States by the mother of an Army private who was kidnapped and murdered by another serviceman, while off-duty. *Id.* at 3040. The plaintiff alleged the army was negligent by having knowledge of, and by not asserting greater control over, the assailant, who had a previous conviction for manslaughter. *Id.* at 3041.

[49] *Shearer*, 105 S. Ct. at 3043 n.4. In *Shearer* the government contractor defense was not considered because it was not asserted by the parties.

suit requires the civilian court to second guess military decisions and whether the suit might impair essential military discipline."[50]

The doctrine enunciated by *Feres* and *Stencel* precludes federal government liability in a suit by a member of the military for service-connected injuries or in an indemnity action for the same injuries.[51] To allow such litigation would require that a civilian court interfere in military matters at the possible expense of military discipline and effectiveness, or second guess military judgments.[52]

2. Traditional Government Contractor Defense

In 1940, the United States Supreme Court recognized a form of the government contract defense in *Yearsley v. Ross Construction Co.*,[53] which provided immunity for a government contractor.[54] In *Yearsley*, a property owner filed suit against a government contractor to recover damages for the erosion of his property which allegedly resulted from the defendant-contractor's construction of dikes.[55] These dikes were constructed pursuant to a contract with the federal government.[56] The Court held that liability could not be imposed upon the government contractor due to his position as an agent or officer of the government and the contractor was, therefore, immune from suit, as was the government.[57] Thus, the rule essentially states that a contractor may avoid liability by sharing the government's sovereign immu-

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[50] *Id.* at 3043. The Court held that the *Feres* doctrine barred the plaintiff's recovery and concluded that to allow such an action against the government would require a civilian court to review a professional military decision regarding the "management" of personnel, which goes directly to choices of "discipline, supervision and control of a serviceman." *Id.* Further, a civilian judicial inquiry would produce results adverse to military effectiveness and would eventually require military officers to present evidence, in a civilian court, as to the wisdom of military decisions. *Id. See* Chappell v. Wallace, 462 U.S. 296, 302 (1983)(military decisions are governed by civilian control of legislative and executive branches, not judicial branch); *infra* note 106.

[51] *See supra* notes 30-46 and accompanying text.

[52] *Shearer*, 105 S. Ct. at 3043.

[53] 309 U.S. 18 (1940).

[54] *Yearsley*, 309 U.S. at 18, 20-22; *see also* Brady v. Roosevelt S.S. Co., 317 U.S. 575, 583 (1942)(citing *Yearsley* for proposition that government contractors obtain certain immunity in connection with work pursuant to government contracts). The tort imunity of the federal government also extended to federal agencies. RESTATEMENT (SECOND) OF TORTS § 895A comment c (1979).

[55] *Yearsley*, 309 U.S. at 19.

[56] *Id.* at 19-20.

[57] *Id.* at 20-22. *See generally* Note, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 CHI. L. REV. 1030, 1045-46 (1981)(discussing sovereign immunity of government agent).

nity. Where the contractor complies with specifications provided by the government when executing a governmental contract, he will be treated as an agent of the federal government.

Initially, the traditional government contract defense was applied to bar actions against goverment contractors performing public works projects.[58] However, the difficulty encountered in this application is that the contractor must actually occupy an agency relationship with the government.[59] Since most military contractors are independent contractors, the eventual defendants will have difficulty in establishing an agency relationship with the government, and the traditional government contract defense is virtually useless.

The modern government contract defense was first articulated by the Ninth Circuit Court of Appeals in *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*,[60] where the court concluded that the

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[58] *See, e.g.*, Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963)(government contractor held immune from liability for damages caused while building federal highways); Green v. ICI America, Inc., 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973)(contractor of ammunition plant entitled to share government's immunity in nuisance action); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965)(government contractor immune from liability for damages caused by dredging river channels). However, courts have not allowed contractors to assert the government contract defense as a bar to liability for damages resulting from the contractors' exercise of discretion. *See, e.g.*, Thompson Caldwell Constr. Co. v. Young, 294 F. 145, 146 (4th Cir. 1923)(defense not available where defendant negligently left unlighted truck partially blocking roadway); Converse v. Portsmouth Cotton Oil Refining Corp., 281 F. 981, 984-86 (4th Cir. 1922)(defendants liable for damages resulting from disposition of dredged material where they exercised discretion in selecting disposal site).

Some courts have also construed *Yearsley* to apply the government contract defense to public works contractors without inquiring into whether a formal agency relationship existed between the government and the contractor. *See, e.g., Myers*, 323 F.2d at 583 (defendant merely had contract with government; court did not mention any type of agency relationship existed); *Dolphin Gardens*, 243 F. Supp. at 827 (summary judgment on basis of defendant's government contract). The *Yearsley* agency relationship differed from the government contract defense, which provided that one who contracted with the government for a public works project would not be held liable for damages resulting from the performance of that contract; however, the contractor would have been liable for damages resulting from the negligent completion of the work. *Green*, 362 F. Supp. at 1265. Normally, negligent completion of the contract referred to mismanufacture, which did not entitle the contractor to the defense. *See, e.g.*, Foster v. Day & Zimmerman, Inc., 502 F.2d 867, 874 n.5 (8th Cir. 1974)(defectively manufactured grenade was not what contract specified).

[59] *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985)(rule in Fifth Circuit that "the contractor must be an agent of the government before invoking its immunity"); Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1015 (5th Cir. 1969)(rejected immunity under defense, defendants were independent contractors).

[60] 295 F.2d 14 (9th Cir. 1961).

contractor must be compelled to follow design specifications before the defense is available.[61] In *Merritt* the plaintiff brought suit to recover damages allegedly caused by a defectively constructed cofferdam which the defendant-contractor had built pursuant to a contract with the government.[62] The court reasoned that since there was nothing in the record that showed the contractor was obligated to follow the design specifications, then the government contract defense would not be applicable to exculpate the defendant.[63]

During recent years, the government contract defense has been recognized and applied outside of circumstances involving public works projects and within the modern context of products liability in cases involving defective military equiment.[64] In *Sanner v. Ford Motor Co.*,[65]

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[61] *Id.* at 15-16. The court stated, "[i]t is elementary that *compulsion* must exist before the 'government contract defense' is available." *Id.* at 16 (emphasis added).

[62] *Id.* at 14-15. The court found that the contractor was not required or directed to follow any specific plans; in fact, the only details provided by the government to the contractor did not contain detailed drawings but merely specified the minimum and maximum water crest levels. *Id.* at 15.

[63] *Id.* at 15-16. The court held that the government must compel the contractor to follow precise design specifications because the element of compulsion was fundamental to the existence of the government contract defense. *Id.* at 16. *Cf.* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983)(government contractor defense applied where government established or approved reasonably specific design specifications), *cert. denied*, 464 U.S. 1043 (1984). The court in *Merritt* recognized that where the government adopted a detailed set of plans prior to the contract and where the specifications were actually inadequate, the contractor was relieved of liability, provided the specifications were coplied with. *Merritt*, 295 F.2d at 16. *Compare* Littlehale v. E.I. du-Pont de Nemours & Co., 268 F. Supp. 791, 801-03 (S.D.N.Y. 1966)(contractor held not liable where requird to manufacture blasting caps according to precise specifications provided by military), *aff'd*, 380 F.2d 274 (2d Cir. 1967), *with* Boeing Airplane Co. v. Brown, 291 F.2d 310, 312 (9th Cir. 1961)(manufacturer held liable when given complete freedom to design complex aircraft). *But see* Brown v. Caterpillar Tractor Co., 696 F.2d 246, 253 (3d Cir. 1982)(refutes compulsion requirement in *Merritt*). *See generally*, Note, McKay v. Rockwell Int'l Corp.: *No Compulsion Required for Government Contractor Defense*, 28 ST. LOUIS U.L.J. 1061 (1984)(discussing compulsion as necessary requirement of government contract defense).

[64] *See, e.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 415 (4th Cir. 1986)(manufacturer of defective helicopter absolved of liability due to government contractor defense); Dowd v. Textron, Inc., 792 F.2d 409, 412 (4th Cir. 1986)(defense precludes liability of manufacturer of defective helicopter); Tozer v. LTV Corp., 792 F.2d 403, 409 (4th Cir. 1986)(held defense prevents liability of manufacturer of military aircraft); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 743 (11th Cir. 1985)(recognized defense but not applied to manufacturer of defective aircraft); Burgess v. Colorado Serum Co., 772 F.2d 844, 846-47 (11th Cir. 1985)(manufacturer of vaccine not liable due to application of government contractor defense); Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985)(defense recognized in suit against manufacturer of Army cargo carrier);

a passenger who was injured when he was thrown out of an army jeep filed suit against the jeep"s manufacturer on the ground that the vehicle was defective since it did not contain seatbelts or a roll bar.[66] The plaintiff alleged that the vehicle was defectively designed and that the manufacturer was liable due to the absence of the safety equipment.[67] The court, however, ruled that the manufacturer was not liable because the manufacturer had produced the vehicle according to specifications provided by the military which expressly omitted the installation of seat belts and a roll bar.[68] Thus, the government contractor defense applied to preclude liabilty.

III. Modern Government Contractor Defense — Three Tests

A. In Re Agent Orange Product Liability Litigation

The government contractor defense was addressed by Judge Pratt of the United States District Court for the Eastern District of New York in *In Re Agent Orange Product Liability Litigation.*[69] The plain-

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In re Air Crash Disaster at Mannheim, Germany, 769 F.2d 115, 125 (3d Cir. 1985)(held defendant avoided liability due to government contractor defense in action involving defective helicopter); Tillett v. J.I. Case Co., 756 F.2d 591, 600 (7th Cir. 1985)(defendant-contractor asserted government contractor defense to escape liability from accident involving defective military front-end loader); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450-51 (9th Cir. 1983)(defense utilized to avoid liability for defective design of ejection system), *cert. denied*, 464 U.S. 1043 (1984); In re Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1052-54 (E.D.N.Y. 1982)(court stated elements necessary for manufacturer of chemical defoliant to avoid liability); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764, 768 (1983)(applied defense in strict liability action against helicopter manufacturer); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400, 402 (N.Y. Sup. Ct. 1980)(defense applied to manufacturer of Army kitchen equipment in personal injury action), *aff'd*, 79 A.D.2d 1117, 436 N.Y.S.2d 907 (1981).

[65] 144 N.J. Super 1, 364 A.2d 43 (N.J. Super. Ct. Law Div. 1976), *aff'd per curiam*, 154 N.J. Super 407, 381 A.2d 805 (N.J. Super.Ct. App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

[66] *Sanner*, 364 A.2d at 43-44.

[67] *Id.* at 44.

[68] *Id.* at 46-47. The court concluded that holding the manufacturer responsible for a defect in the design of a product which was manufactured according to specifications provided by the Army would severely damage the government's ability to decide the type and nature of military equipment necessary to provide for the national defense. *Id.* at 47.

[69] *In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied*, 405 U.S. 1067 (1984). The Agent Orange case went before the district court numerous times. *See In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1263-64 (E.D.N.Y. 1985)(motion for summary judgment granted); *In re* Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 769 (E.D.N.Y.)(motion to dismiss based on government contract defense), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 465 U.S. 1067 (1984); *In re*

tiffs were Vietnam veterans and their dependents, who alleged that they suffered injuries and damages as a result of exposure to the chemical Agent Orange,[70] a defoliant used by the military during the Vietnam War. Judge Pratt concluded that the government contractor defense would absolve the defendant-manufacturer of liability where the defendant supplied the chemical to the government under a governmental contract, if the defendant could prove three elements:

> (1) that the government established the specifications for "Agent Orange;"
> (2) that the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
> (3) that the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange."[71]

Agent Orange Prod. Liab. Litig., 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

[70] *Agent Orange*, 506 F. Supp. 762, 768-69 (E.D.N.Y.), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 465 U.S. 1067 (1984). The plaintiffs alleged numerous theories of liability, including strict products liability, negligence, breach of warranty, intentional tort and nuisance. *Id.* at 769. The veterans who were exposed to the defoliant sought to recover for their personal injuries while the dependents sought redress for genetic injuries, birth defects, and miscarriages caused by the veterans' exposure to the chemical. *Id.*

[71] *In re* Agent Orange Prod. Liab. Litig., 534 F. Supp. 1046, 1055. The court stated that the first element required that the product be one for which the government had provided detailed specifications for the contractor to use in production. *Id.* at 1056. Furthermore, the court expressly limited the defense to a situation where government specifications detailed a particular product rather than where general performance specifications were provided. *Id.*; *cf.* Koutsoubos v. Boeing Vertol, 553 F. Supp. 340, 344 (E.D. Pa. 1982)(court permitted some degree of contractor participation in design process), *aff'd*, 755 F.2d 352 (3d Cir. 1985). As to the second element, the court pointed out that the defense could not be asserted if the contractor had any control or discretion concerning the manufacturing process or dioxin contamination level, unless the government at least had equal knowledge of the hazards and imposed no requirements or restrictions with respect to the dioxin level. *Agent Orange*, 534 F. Supp. at 1057. The final element placed a duty on the manufacturer to warn the government of the product's dangers or faults which, if they had been known by the government, might have altered the government's decision as to whether or how to use the product. *Id. See generally* Rivkin, *The Government Contract Defense: A Proposal for the Expeditious Resolution of Asbestos Litigation*, 17 FORUM 1225, 1226-30 (1982)(discussion of elements of government contract defense in *Agent Orange II* decision).

The *Agent Orange* court stated another policy consideration for the application of the government contractor defense to military contractors by asserting that the essence of tort liability attempted to impose liability on the one whose tortious act caused the injury and not upon the contractor who performed according to detailed specifications

Thus, the court determined that if the manufacturers could prove that the government established the design, that they complied with the design, and that they informed the government of known dangers inherent with the design, then the claims against them would be dismissed.[72]

The court in *Agent Orange* based the need for recognition of the government contract defense on the principles of fairness and public policy.[73] With respect to fairness, the court rationalized that the plenary emphasis of tort liability attempts to place the responsibility for the tortious act upon the wrongdoer, not the innocent party whose only wrongful act was to follow specifications provided by the wrongdoer.[74] In order for tort liability to be effective, the ultimate wrongdoer must be held accountable for the injuries he caused, thereby preventing future wrongful acts.[75] Second, holding otherwise innocent contractors liable for design defects would increase the cost of military contracts and pass the costs of accidents on to the government, thwarting the government's immunity under *Feres-Stencel* and in essence defeating public policy.[76]

In 1985, the defendant's motion for summary judgment was granted by the court because the plaintiffs were unable to overcome

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provided by another. *Agent Orange*, 506 F. Supp. at 793-94.

[72] *Agent Orange*, 534 F. Supp. at 1055. The government contractor defense as pronounced in *Agent Orange* has been adopted by vaious courts. *See, e.g.*, Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354 (3d Cir. 1985)(defense applied in action involving military helicopter). However, in *Koutsoubos* the court determined that even though the design specifications were the result of the manufacturer working with the government there was a sufficient amount of government participation to conclude that the first element of the *Agent Orange* test was met by the manufacturer-defendant. *Koutsoubos*, 755 F.2d at 355.

[73] *Agent Orange*, 506 F. Supp. at 793; *see* Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985)(fairness prescribes "innocent contractor should not be ultimately liable for a dangerous design when the responsibility properly lies elsewhere").

[74] *Agent Orange*, 506 F. Supp. at 793; W. Prosser, The Law of Torts § 4 at 23 (5th ed., 1984); *see supra* notes 10-13 and accompanying text.

[75] *Agent Orange*, 506 F. Supp. at 793-94.

[76] *Id.* at 794; see Bynum v. FMC Corp., 770 F.2d 556, 565-66, (5th Cir. 1985) (contractors would pass cost through cost overrun provisions in contracts); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 449 (9th Cir. 1983)(same).

However, the Supreme Court stated in United States v. Shearer, 473 U.S. 52 (1985) that the factors of *Feres* and *Stencel* were "no longer controlling" and the only issue that remained was "whether the suit requires the civilian court to second guess military decisions and whether the suit might impair essential military discipline." *Id.* at 57. Thus, the issue of whether or not the result of litigation passes the cost of accidents to the government is no longer of significance after the decision in *Shearer*.

the defendants' government contract defense.[77]

B. McKay v. Rockwell International Corp.

The Ninth Circuit in *McKay v. Rockwell International Corp.*[78] combined the *Feres-Stencel* doctrine[79] with the traditional government contract defense[80] and established a broad and flexible test applicable to military contractors, which may operate to absolve the contractor of liability.[81] In *McKay*, the plaintiffs alleged that the defendant had defectively designed an aircraft ejection system which had caused the deaths of plaintiffs' husbands, both Navy pilots.[82] The court concluded that only under narrow circumstances could a manufacturer of military equipment be held strictly liable for a defective design which caused injuries to servicemen on active duty.[83] The government contractor defense,[84] as pronounced by the court, provides that the manufacturer-

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[77] *In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1223, 1263 (E.D.N.Y. 1985). The record was clear that the decision was a well-informed, conscious decision of military authorities where the government knew as much as, if not more than, the contractor about the adverse health effects of the chemical defoliant. *Id.* The evidence available made it apparent that military authorities viewed the possibility of cutting down casualties by defoliating the jungles sufficient to outweigh any risks of exposure to United States troops. *Id.* at 1263-64. Thus, the decision came within the discretionary exception of the FTCA, thereby precluding claims. *Id.* at 1264.

[78] 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

[79] *Id.* at 448; *see supra* notes 30-52 and accompanying text.

[80] *McKay*, 704 F.2d at 448-49; *see supra* notes 53-68 and accompanying text.

[81] *McKay*, 704 F.2d at 451. The test established in *McKay* has also been followed by the Fourth Circuit in Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); the Fifth Circuit in Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985); the Seventh Circuit in Tillett v. J. I. Case Co., 756 F.2d 591, 600 (7th Cir. 1985); and the Third Circuit in Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354-55 (3d Cir. 1985).

[82] *McKay*, 704 F.2d at 446. The pilots were killed, in unrelated accidents, as a result of injuries sustained while ejecting from the aircraft. *Id.* The aircrafts were modified supersonic carriers which required an ejection system that used rocket thrust to eject the crew into the airstream and allow the crew to safely descend. *Id.* The cases were consolidated for trial and the district court determined that federal law would be applied pursuant to the Death on the High Seas Act, 46 U.S.C. §§ 761-67 (1982). *McKay*, 704 F.2d at 447. *E.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986)(plaintiffs allegedly injured due to defectively repaired helicopter); Dowd v. Textron, Inc., 792 F.2d 409, 410 (4th Cir. 1986)(plaintiffs alleged defective design of rotor system in helicopter caused death); Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)(plaintiff alleged defective design of aircraft modification); Bynum v. FMC Corp., 770 F.2d 556, 558-59 (5th Cir. 1985)(plaintiff alleged defective design of Army cargo carrier).

[83] *McKay*, 704 F.2d at 447.

[84] *Id.* at 449. The court applied the government contractor defense based on various reasons which duplicated the rationale supporting the *Feres-Stencel* doctrine. *Id.* First,

supplier of "military equipment"[85] will not be subject to strict liability for a design defect where the defendant proves four criteria:

> (1) the United States is immune from liability under *Feres* and *Stencel*;[86]
> (2) the United States established, or approved, reasonably precise specifications for the allegedly defective military equiment;
> (3) the equipment conformed to those specifications; and
> (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.[87]

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the *McKay* court determined that to hold the military supplier liable regardless of the extent of the government's involvement would undermine the *Feres-Stencel* doctrine, because suppliers would pass the additional cost along to the government through cost overrun provisions in equipment contracts. *Id. But see* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-42 (11th Cir. 1985)(competition from contractors with better safety records would deter passing of costs). *See generally* Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. Rev. 601, 618 (1980)(government would likely receive burden of liability).

Second, the court expressed its concern with the possibility of forcing the judiciary to review military decisions, especially situations that would obligate the court to question professional military judgments. *McKay*, 704 F.2d at 449; *see Agent Orange II*, 534 F. Supp. at 1054 n.1 (government may wage war in any manner it deems advisable); Aero Corp. v. Dep't of the Navy, 493 F.Supp. 558, 567 (D.D.C. 1981)(courts should not question Navy's judgments concerning operational requirements or acceptable level of risk); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 450 (S.D.N.Y. 1964)(courts should hesitate to question military decisions). Further, the court added that judiciary review would have placed much concern on proper separation of powers. *McKay*, 704 F.2d at 449; *cf. Shaw*, 778 F.2d at 742-43 (military contractor defense based exclusively on separation of powers).

Third, the court noted that the military must maintain ample latitude in designing military equipment in order to take the necessary risks which continue to thrust military technology toward its outward boundary. *McKay*, 704 F.2d at 449-50; *cf. Shaw*, 778 F.2d at 743 (military risk-taking would be shielded from judicial review by military contractor defense). Finally, the government contractor defense would have allowed a closer relationship between the government and its suppliers in the procurement of advanced military equipment. *McKay*, 704 F.2d at 449-50. *But see Shaw*, 778 F.2d at 743 (close relationship would create difficulty in determining who actually designed defective product).

[85] *McKay*, 704 F.2d at 451. Even though the court was reluctant to leave the term "military equipment" without an exclusive or precise definition, the court expressly limited the applicability of the test set forth to situations that involve "military equipment." *Id.* However, the court noted that there was a distinction to be made between normal consumer goods, used by the military, to which strict liability principles apply, and military products such as tanks or guns. *Id.*

[86] *Id.* at 451; *see supra* notes 30-52 and accompanying text.

[87] *McKay*, 704 F.2d at 451; *see, e.g.*, Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir.

The Ninth Circuit in *McKay* partially discarded the element of compulsion and allowed the government contractor defense to be applicable to military contractors in situations where the government merely viewed and approved a detailed set of specifications.[88] It is clearly stated under *McKay* that a manufacturer-contractor will avoid liability even when the contractor had complete control and discretion over the design of the military product, as long as the government approved the specifications. Therefore, in cases where the government creates or approves a design which causes an injury, the government contractor defense of *McKay* will operate to shield the contractor from liability because the injurious tortious act was actually attributable to the government.[89]

1986) (application of *McKay* test); Bynum v. FMC Corp., 770 F.2d 556, 558-59 (5th Cir. 1985) (applied *McKay* elements). The second, third and four elements are virtually the same as the test in *Agent Orange*, with the exception of the inclusion of approved language by the court in *McKay*. *Cf. Agent Orange II*, 534 F. Supp. at 1056 (test does not include "or approved by government" language). *But see* Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961)(court stated compulsion must exist before government contract defense is available).

[88] *McKay*, 704 F.2d at 450. Essentially, the court broadened the scope of the defense applied in *Merrit*, where compulsion was fundamental. *Id.* at 450-51. The court in *McKay* stated that the defense would not be applicable where the government merely set out "minimal or very general requirements," but the defense would be applicable "where the United States reviewed and approved a *detailed* set of specifications." *Id.* at 450 (emphasis added). The court distinguished *Merritt* from *McKay* and determined that in *Merritt* the court rejected the government contractor defense because there the government simply set a height requirement for the cofferdam and did not establish or approve reasonably precise design specifications. *Id.* However, in dissent, Judge Alarcon insisted that the majority erred in dismissing the compulsion requirement because the Ninth Circuit had previuosly held in *Merritt*, that compulsion is an "elementary requirement of the defense." *Id.* at 458 (Alarcon, J., dissenting).

As a result of the court's conclusion, the court in *McKay* reversed and remanded the decision for a determination by the trial court as to whether or not the government established or approved reasonably precise specifications of the aircraft's ejection system. *Id.* at 453. If the trial court feels that the government did not set or approve the design specifications then the contractor will be subject to strict liablity under the RESTATEMENT (SECOND) OF TORTS section 402A. *Id. See generally* Asselta & Fitzpatrick, *Government Contractor Defense*, 28 TRIAL LAW. GUIDE 1, 23 (1984)(noted "established or approved" as important language because court used disjunctive twice).

[89] *McKay*, 704 F.2d at 450-53. The government contractor defense as enunciated by the court in *McKay* has been adopted by various courts. *See, e.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986)(defective helicopter); Dowd v. Textron,Inc., 792 F.2d 409, 411 (4th Cir. 1986)(same); Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986)(defective military aircraft); Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985)(defense absolves manufacturer of defective cargo carrier of liability); Tillett v. J. I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985)(defense applied under Wisconsin law in

Many commentators have argued that the "or approved" language of *McKay* seems to allow contractors to avoid liability, since a mere "rubber stamp" approval[90] by the government is easily obtained. Where the courts require genuine governmental participation in the design process, however, the primary purpose of the defense will be met and the court's decision will be well-founded and unequivocal. Therefore, courts must recognize that the "or approved" language of *McKay* mandates that the government approve the design, more than mere rubber stamp approval, after their knowledge of the product's deisgn is at least equal to or greater than that of the contractor.[91]

The rationale enumerated by the court in *McKay* was very similar to the reasoning behind the *Feres-Stencel* doctrine. First, to allow recovery against a miliary contractor would effectively make the United States government subject to liability when a serviceman was injured by defective military products.[92] This would result indirectly, because the contractor "would pass the cost of accidents on to the United States through cost overrun provisions in equipment contracts."[93] However, Judge Alarcon, in dissent, argued that this would not be the case because, eventually, the suppliers with better safety records would obtain liability insurance at lower rates and the free market system of defense procurement would insure that these costs were only minimally passed on to the government.[94]

Second, the court stated a concern for constitutional separation of powers, in that if military contractors were held liable for defective designs created or approved by the government such an action would "thrust the judiciary into the making of military decisions."[95] The

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action involving military front-end loader).

[90] *See infra* note 107.

[91] *See supra* notes 78-99 and accompanying text.

[92] *McKay*, 704 F.2d at 449. However, the court distinguished the Supreme Court decision of Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), from this *McKay* rationale. *McKay*, 704 F.2d at 449 n.7. In *Lockheed*, the plaintiff was a civilian employee of the military who was killed in the crash of a military aircraft and was paid death benefits under the Federal Employees' Compensation Act (FECA). In the resulting suit, the defendant-contractor impleaded the United States for indemnity and the court ruled that, unlike the Federal Tort Claims Act, the FECA does not bar indemnity actions against the government.

[93] *McKay*, 704 F.2d at 449; *see supra* note 76.

[94] *Id.* at 457 (Alarcon, J., dissenting). Judge Alarcon did not agree with the majority's assumption that contractor liability would substantially increase the cost of military equipment. *Id.*

[95] *Id.* at 449; *see* Tozer v. LTV Corp., 792 F.2d 403, 405-06 (4th Cir. 1986)(military decisions should not be made by judiciary, least accountable branch of government); Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985)(civilian courts should not ques-

questioning of military decisions in the civilian courts of this country,[96] by placing the government's design specifications at issue, would have adverse effects on military discipline.

Along the same line, the third rationale stated that "in setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods."[97] This rationale states the need for a body of law separating products liability actions involving military equipment from those involving ordinary consumer equipment or goods.

Finally, the court noted that "a government contractor defense provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment."[98] This rationale allows the contractors to remain protected even in the situation where the design of the equipment is substantially created by the manufacturer but the government's contribution was significant. Thus, the fine line between government-created design specifications and private contractor-created design specifications becomes very blurry and the issue is one for the jury to decide.

C. *Shaw v. Grumman Aerospace Corp.*

In 1985, the Eleventh Circuit in *Shaw v. Grumman Aerospace*

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tion professional military decisions); *Agent Orange*, 534 F. Supp. at 1054 (decisions of risk or liability should not be placed on supplier or courts); *see also* Morrison v. Larsen, 446 F.2d 250, 253 (9th Cir. 1971)(courts review of military decisions "narrowest known to the law"); Aero Corp. v. Department of the Navy, 493 F. Supp. 558, 567 (D.D.C. 1981)(not role of court to question military decisions, specifically as to operational requirements); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 450 (S.D.N.Y. 1964)(questions relating to national defense must be answered by military).

This rationale agrees with that stated by the Court in United States v. Shearer, 473 U.S. 52 (1985), because constitutional separation of powers prevents the judicial branch from reviewing decisions that are vested solely in the executive and legislative branches.

[96] *McKay*, 704 F.2d at 449; *see* Stencel Aero Eng'g. Corp. v. United States, 431 U.S. 666, 673 (1977)(trial should not involve "second guessing military orders," would necessitate testimony by servicemen as to orders given by other servicemen).

[97] *McKay*, 704 F.2d at 449-50. The question of how far and hard to push technology is one for the military to decide and not the courts. *Id.*; *see supra* note 68.

[98] *McKay*, 704 F.2d at 450; *see generally* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025, 1067-68 (1982)(reluctance of contractors to provide products to government would inhibit essential functions of government).

Corp.[99] recognized a form of the government contractor defense[100] and identified it as the military contractor defense.[101] Instead of basing its decision on the rationale of *Agent Orange* or *McKay*,[102] the court determined that the military contractor defense was based exclusively upon the constitutional spearation of powers and did not grow out of the two traditional defenses mentioned previously.[103] In *Shaw*, the plaintiff's decedent was killed when his military aircraft crashed as a result of an alleged defect in the aircraft's stabilizer system, which operated the steering mechanism.[104] The court concluded that this de-

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[99] 778 F.2d 736 (11th Cir. 1985).

[100] *Id.* at 738-39. The court recognized the existence of the defense but based its application upon reasons different from those relied upon by other circuits. *Id.*

[101] *Id.* at 739 n.3. The court stated the new term "is more descriptive and more precise." *Id.*

[102] *Shaw*, 778 F.2d at 744. The *Shaw* court expressed its displeasure with each of these tests and concluded that these elements were secondary to whether or not the military actually made the decision to deploy such dangerous products. *Id.* at 745. The court recognized that the only substantial difference between the tests in *McKay* or *Agent Orange* was the extent of the government's involvement in the creation of the design of the equipment. *Id.* at 744.

The court reviewed and commented on each of the *McKay* court's rationales. First, with respect to the possible subversion of the *Feres-Stencel* doctrine, the court in *Shaw* labeled this as "weak support" for the defense because the cost pass-through rationale was based on a misinterpretation of *Feres* and *Stencel*. *Id.* at 742. This conclusion is due to the Supreme Court's decision in United States v. Shearer, 473 U.S. 52, 58 (1985), that the limitation of governmental liability rationale of *Feres-Stencel* is "no longer controlling." In any case, the Eleventh Circuit in *Shaw* refused to apply or recognize "a military contractor defense simply to shield such contractors - and (only arguably) the government - from the cost of liability for defectively designed products." *Shaw*, 778 F.2d at 742.

In reviewing the second element of *McKay*, the court in *Shaw* stated that this is merely a military discipline rationale which represents the classic separation of powers theory. *Shaw*, 778 F.2d at 742. Whether such an action would "thrust the judiciary into the making of military decisions" was of the utmost concern to the *Shaw* court and the military contractor defense essentially means that "the military must be free to decide that the risk of accident or injury to servicemen from a design defect in the equipment it orders is a risk that it is willing to take - without judicial interference." *Id.*

The third element of *McKay*, that non-recognition of the defense would restrict the risk-taking in the development of new technology, was virtually a "restatement" of the military decision rationale of the second element. *Id.* at 743. Similarly, the *Shaw* court concluded that the fourth element of *McKay*, encouraging contractors to work closely with the government, would actually make it virtually impossible to determine who made the design decisions. *Id.*

[103] *Shaw*, 778 F.2d at 740. *But cf.* Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985)(government contract defense is "essentially amalgamation of two traditional defenses"); Johnson v. United States, 568 F. Supp. 351, 353 (D. Kan. 1983)(same).

[104] *Shaw*, 778 F.2d at 738.

fense would be but "a *narrow* exception to the product liability law that governs all other product designs"[105] and was based solely on the theory that "constitutional separation of powers compels the judiciary to defer to a military decision to use a weapon . . . designed by an independent contractor, despite its risk to servicemen."[106] The test enunciated by the court in *Shaw* provides that a contractor may escape liability if it affirmatively proves:

> (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; *or*
> (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.[107]

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[105] *Id.* at 741. Thus, the defense is not to be automatically applied in product liability litigation involving military contractor-suppliers.

[106] *Id.* at 743. Thus, the decision to undertake the risk must be one which the military should make. It is definitely a decision for the military or executive branch of government, and not the judicial branch. *Id.* at 741. The decision should be made by the executive branch and the military, and "is not a matter for the judicial economists." Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986).

The theory behind the constitutional separation of powers with respect to military matters was stated by the Supreme Court in Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953), where the court held that the judiciary does not have the responsibility for running the military, the courts should not intervene in military matters and the military should not interfere with judicial matters. In Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981), the Court stated that "the case arises in the context of Congress' authority, and perhaps in no other area has the Court accorded Congress greater deference." Further, the Court in Gilligan v. Morgan, 413 U.S. 1 (1973), stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the judicial branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of the military force by elected representatives and officials which underlies our entire constitutional system.

Id. at 10.

[107] *Shaw*, 778 F.2d at 746. The first part of the test allows the contractor to use the defense even though he has participated in the product's design process. *Id.* However, in

The rationale behind the test set forth in *Shaw* states that "when a knowing and purposeful decision to employ such products is made by the military, the judiciary may not question it."[108] The focus in apply-

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order for the contractor to meet the test, he must prove that his participation was actually so nominal as to excuse proof of the second part. *Id.* Therefore, the contractor must show that the participation of the government was substantial enough for the court to deem the specifications as being made by the government and the mere fact the contractor participated will not defeat the defense. *Id.*; Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3d Cir. 1985)(*McKay* "approval" language read into *Agent Orange*, allowed minimal participation in recognizing defense).

The test requires that element (1) *or* (2) be met; thus if the first element is not proven sufficiently, then proof of the second element will still allow the defense to remain applicable. *Shaw*, 778 F.2d at 746. The second element requires that the contractor warn the military of product risks or provide information of design alternatives which are known, or should have been known, by the contractor. *Id.* Also, the second element requires that the military "clearly authorized the contractor to proceed with the dangerous design." *Id.* The essential element of the defense, whether the contractor significantly contributed to the design, is to determine if the military actually authorized the contractor to proceed with the product despite the dangerous design. *Id.*

The authorization necessary is "more than 'rubber stamp' approval" and must be made by a military decision-maker informed and knowledgeable of all the risks and benefits involved in the use of such a product. *Shaw*, 778 F.2d at 746. *Cf.* Schoenborn v. Boeing Co., 769 F.2d 115, 122 (3d Cir. 1985)(approval amounts to "more than mere rubber stamp" and there was true governmental participation). If such an informal decision is actually made, then the defense should be applied to relieve the contractor of liability. If not, the contractor would be left open to suit under the law of products liability. *Id.*

[108] *Shaw*, 778 F.2d at 741. The proper avenue for questioning military decisions is at the election booths. *Id.*

The separation of powers theory essentially mandates that "the military must be free to decide that the risk of accident or injury to servicemen from a design defect in the equipment it orders is a risk that it is willing to take - without judicial interference." *Id.* at 742. The theory takes into account the unique relationship between military officers and their subordinates, and that the principle of a successful military is the maintenance of strict military discipline, such that orders will not be questioned but will be followed. *Id.*; *see* United States v. Brown, 348 U.S. 110, 112 (1954)(allowance of action against government for negligent orders given or negligent acts committed would distort "peculiar relationship" of soldier to his superiors). Also, the court agreed with the rationale stated in *Agent Orange* that:

> the purpose of a government contract defense . . . is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factor that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts,

and added that the same considerations are necessary to allow the government "to prepare for war." *Shaw*, 778 F.2d at 740 (quoting *Agent Orange*, 534 F. Supp. at 1054 n.1); *see supra* notes 48-52 and accompanying text.

ing the military contractor defense is on the determination of whether or not the decision to use a dangerous product was actually made by a military official, with indepth knowledge of all the product's risks and benefits.[109]

In applying the test to the facts of *Shaw*, the court concluded that the first part of the test was not met since the aircraft was designed exclusively by the defendant-contractor.[110] Further, the second part of the test was not met since the defendant-contractor failed to provide the military with adequate warning of the dangers involved.[111] Therefore, the approval by the government was not the type of informed military decision required before the government accepts such a dangerous risk.[112] As a result, the military contractor defense did not shield the contractor from liability.[113] Currently, petition for certiorari of *Shaw* is before the Supreme Court. Whether the Court will act on this petition is not known, but as of this writing, none of the recent products liability cases involving military suppliers have been granted certiorari.

IV. Conclusion

Presently, it is clear that government contractors may assert the government contractor defense against liabilities incurred in the performance of government contracts. The courts in *Agent Orange*, *McKay*, and *Shaw* have stated three tests which allow a contractor to avoid liability. Although the elements of each test appear different, the three are not in conflict with one another, and the viability of the defense is undisputed.

The test in *Agent Orange* can be called the generic test — because it is basic and straight-forward. The contractor will avoid liability if the government established the specifications, the finished product met the specifications, and the government's knowledge of the product's

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[109] *Shaw*, 778 F.2d at 746.

[110] *Id.* at 746-47. The trial court determined that the A-6 military aircraft was designed and produced exclusively by the defendant-contractor and the government's participation was not sufficient to meet the first element. *Id.* at 747.

[111] *Id.* The trial court determined that the contractor did not sufficiently warn the military of the defect, and the military did not possess sufficient expertise to make the warning unnecessary. *Id.*

[112] *Id.* The court determined the contractor had actual knowledge of the defect but their warning to the military was not sufficient enough to allow the military an opportunity to make a decision based upon full knowledge of the product's risks and capabilities. *Id.*

[113] *Id.*

hazards or risks was equal to or greater than that of the contractor.[114]

In *McKay* the court simply broadened the *Agent Orange* test to prvoide for circumstances where the design was not established by the government but the government participated in the design and had sufficient information to make a knowledgeable decision as to whether to use the hazardous product. The requirement of immunity under *Feres* and *Stencel*, which was affirmatively stated in *McKay*, was previously implied by the *Agent Orange* court. The Third Circuit recognized in *Koutsoubos v. Boeing Vertol*[115] that the test in *McKay* simply rephrased the *Agent Orange* test to provide for different considerations.

In *Shaw* the court specifically narrowed the defense into two categories; if either is met then the defense will operate to absolve the contractor of liability. First, liability is avoided if the contractor did not participate or participated only at a de minimus level in the design of the product. In this respect the defense follows the contract specification defense discussed earlier. If this requirement is not met, the defense is still allowed where all risks and hazards are known to the military, and a specific decision is made by the military authorities to proceed with the dangerous product. This element reflects the second and fourth requirements of *McKay*, which were also expressed in *Agent Orange*.

In *Shearer*, the Supreme Court stated that in suits brought by servicemen against the government, or where indemnity was sought against the government, the essential issue is "whether the suit requires the civilian court to second guess military decisions and whether the suit might impair essential military discipline.[116] Although this embraces the *Shaw* court's perception of the central issue, it must be noted that *Agent Orange* and *McKay* preceded the Supreme Court's decision. The rationale of both *Agent Orange* and *McKay* included and hinged on the line of cases and rationale that *Shearer* clarified. Therefore, the Court in *Shearer* did not overrule any of the rationale of *Agent Orange* and *McKay* but simply narrowed the rationale upon which these decisions were based. After *Shearer* the rationale behind the three tests is the same — the only differences are those artificially imposed by the circuit courts.

The government contractor defense is a viable defense applicable

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[114] *See supra* notes 69-76 and accompanying text.

[115] 755 F.2d 352, 355 (3d Cir. 1985); *see* Schoenborn v. Boeing Co., 769 F.2d 115, 122 (3d Cir. 1985)(*McKay* interpreted *Agent Orange* criteria).

[116] *See supra* notes 48-52 and accompanying text.

to military contractors and its elements must be strictly adhered to in application by the courts. By separating the tests of participation and actual decision, the Eleventh Circuit clarified the elements so that misapplication of the defense should be avoided. Proof of the first element in *Shaw* is not too difficult, either the contractor participated or he did not and a de minimus level is an easily applied standard. However, proof of the second element is much more difficult and requires a large amount of documentation and testimony by both the military and the contractor's employees. However, such proof can realistically be obtained, insuring that the suit is adjudicated as justice requires.

T. Kenneth Griffis, Jr.

SUBJECT INDEX

ADMINISTRATIVE LAW
See **Workmen's Compensation**
Misconduct of Attorneys and Judges 642-44
School Boards' Due Process to Rule Breakers 651-53

ADMIRALTY
Development of Longshoremen and Harborworkers' Compensation Act
Distinction Between Land-Based Workers and Seamen 357
Provision for Uniform Federal Compensation 357-58
State Legislation 355-56
Seaman Status
"Balancing" or "Policy Consideration" Approach 376-77
"Contribution to Function of the Vessel" Test 371-74
Fifth Circuit Test 363-65
"Member of a Crew" Test 358-59
"Permanency" and "Substantial Work" Requirement 367-71
Robinson Test 374-78
Three Factor Test 360-62
"Vessel Engaged in Navigation" Test 359-60
Workers on Special Purpose Structures 365-67
Seamen's Remedies
Early Remedies 353-55
Jones Act 355

ADOPTION
Termination of Grandparents' Visitation Rights 734-37

ALIENS
Extradition of 522-32
Involuntary Departure From a Nation 512-22
Principles of Nationality 452-55
Right to Migrate Under Common, Civil, and Social Law 455-67
Voluntary Departure from a Nation 497-512

ALIMONY
See **Domestic Relations**

ARBITRATION
Civil RICO Suits 607-09

ARMED SERVICES
Tort Liability of Government Contractors 833-60

ARREST
Extradition of Persons to Another Nation 522-32

CHOICE OF LAW
Workers' Compensation Law 647-48

CIVIL PROCEDURE
See **Venue**
Conditions for Continuance 663-64
Interlocutory Appeal from Circuit Court 664-66
Mississippi Rules of Civil Procedure
Pleadings 657-58
Real Party in Interest 659-60
Relief from Judgment or Order 660-63

CIVIL RIGHTS
Attempts to Constitutionally Disenfranchise Blacks 10
Constitutional Reform Impeded by Civil Rights Movement 13-14
Constitutional Right to Organize and Join Unions 383
"Mississippi Plan" to Reestablish White Supremacy 9-10
Poll Tax and Literacy Tests 11

COMMERCIAL LAW
See **Uniform Commercial Code**

CONSTITUTIONAL LAW
See **Criminal Procedure**
Affirmative Action
Compensation Rationale 794-98
Individual v. Group Justice 784-92
Utility Rationale 798-800
Eighth Amendment
Constitutionality of Cruel and Unusual Punishment 699-703
Equal Protection
Affirmative Action 781-800
Statutes 785
First Amendment
Anonymous Political Advertising 562-64
Content-Based Restrictions 404-08
Content-Neutral Prohibition Against Posting of Signs on Public Property 411-12
Content-Neutral Time, Place, Manner Restrictions to Regulate Distribution of Printed Matter 410-11

Guarantees Public Criminal Trial Absent Overriding Interest . 424-25
Narrowly Tailored Content-Neutral Time, Place, Manner Restrictions As Valid Zoning Ordinance 412-16
Public Employee Anti-Strike Statute Probably Violates 397-98
Zoning of Adult Theatre 406-07
Zoning to Ban Nude-Dancing 410
Zoning Regulating the Location of Adult Theaters 408-09
Fourteenth Amendment
Abortion and Risk to Mother Versus Risk to Infant 295-96
Abortion and Second Physician Requirements 297
Abortion and Stare Decisis after *Roe v. Wade* 267-323
Abortion Reporting Requirements and Confidentiality 294-95
Apportionment Under Mississippi Constitution Violates 159-60
Bowers and the Right to Privacy 270-323
Childbearing and Governmental Intrusion 302-03
Compelling Interest Imposing Upon Personal Liberties 296-97
Compelling State Interest for Infant in Abortions 296-97
Equal Protection and Education as a Fundamental Right 320
Fundamental Right to Privacy in Childbearing 301-02, 309
Governmental Intrusion Into the Zone of Privacy 301-02, 309
Homosexual Sodomy as a Fundamental Right 317-20
Informed Consent for Abortion 284-89
Legal Status of a Fetus 306-13
Legislative Motivation 280-83
Mandating Physicians to Disclose Information About Abortions 286-89
Pennsylvania Abortion Control Act and *Thornburgh* 270-323
Procedural Issue of Final Judgment Before Jurisdiction 274-78
Supreme Court's Changing Values 304-05
Zone of Privacy 287, 289-94, 301-02, 309
Fourth Amendment
Validity of an Arrest, Search, or Seizure 705-09
Sixth Amendment
Closure of Pretrial Hearing to Protect Trial from Prejudicial Publicity 422-24
Compelling Governmental Interest Required to Close Criminal Trial 426-27
Criminal Defendants' Right to a Speedy Trial 719-22
Ineffective Assistance of Counsel and Prosecutorial Misconduct 688-95
Overriding Interest Required for Public Closure of Criminal Pretrial Hearings 417-18, 427-30
Pretrial Identification of the Accused, Without Counsel 685-86
Right to Fair Trial Defeated by Prejudicial Publicity 420-21
Right to Fair Trial Ensured by Public Court Proceedings 418-19

CONTRACTORS
Tort Liability of Government Contractors 833-60

CONTRACTS
Equipment Lease Transactions 670-73
Impairment of Collateral Securing Promissory Note 668-70
Recission of Automobile Sales Contract 673-75

CORPORATIONS
Comparison of Mississippi Business Corporations Act With Revised Model Business Corporations Act 171-241
Corporate Law Reform
Composition and Structure of Board of Directors 183-88
Disclosure of Financial Information to Shareholders 239-41
Doctrine of Corporation by Estoppel 181
Duty of Care by Management 188-202
Duty of Loyalty by Management 202-12
Indemnification of Corporate Directors, Officers, Agents and Employees 216-28
Liability for Preincorporation Obligations 179-83
Loans to Management 212-14
Officers 214-16
Process of Incorporation 171-74
Role of Secretary of State 174-78
Shareholder's Inspection Rights 236-39
Voting of Shares 228-36
Evaluation of Mississippi's Corporate Laws 165-241

CRIMINAL LAW
Change of Venue 709-13
Discovery Issues and Procedures 716-19
Evidence
Admissibility of Confessions 680-82
Admissibility of Photographs Depicting Victims of a Crime 682-83
Admissibility of Statement Made by Co-Conspirators 687-88
Other Crimes of the Accused 683-85
Pretrial Identification of the Accused 686-87
Qualification of Experts 686-87
Granting of Continuance 715-16
Ineffective Assistance of Counsel and Prosecutorial Misconduct 688-95
Insanity Defense 705
Instructions to the Jury 695-99
Jury Selection 704
Jury Sequestration 704
Mississippi's Bloody Code 6-7
Proper Form of an Indictment 714-15

Sentencing 699-703
Validity of an Arrest, Search or Seizure 705-09

CRIMINAL PROCEDURE
See **Constitutional Law**
Admissibility of Confessions 680-82
Admissibility of Photographs Depicting Victims of Crime 682-83
Change of Venue 709-13
Criminal Defendant's Right to a Speedy Trial 719-22
Discovery Issues and Procedures 716-19
Evidence of "Other Crimes" of the Accused 683-85
Granting of a Continuance 715-16
Ineffective Assistance of Counsel and Prosecutorial Misconduct 688-95
Pretrial Identification of the Accused 685-86
Proper Form of an Indictment 714-15
Validity of an Arrest, Search, or Seizure 705-09

DAMAGES
Scope of for Patent Infringement 618-19

DIVORCE AND SEPARATION
Distribution of Unmarried Couple's Assets Upon Separation 738-40
Movement of Minor Children to Foreign Nation 726-30

DOMESTIC RELATIONS
Distribution of Unmarried Couple's Assets Upon Separation 738-40
Grandparents' Visitation Rights 734-37
Movement of Minor Children to Foreign Nation 726-30

DUE PROCESS
See **Administrative Law**
Appeal from Preliminary Injunction 274-78

ELECTIONS
Mississippi Election Law Reform
Absentee Voting 554-55
Anonymous Political Advertising 562-64
Conduct of Elections 550-54
Disclosure of Campaign Finances 555-59
Mississippi Election Code of 1986 535-66
Poll Workers 561-65
Presidential Preference Primary 559
Qualification of Independent Candidates 560-61
Voting Systems 548-50

EMPLOYEES
Public Employee Anti-Strike Statute
Constitutionality 397-98
Duty of Loyalty 397
Generally 396-99

EQUAL PROTECTION
See **Constitutional Law**
Affirmative Action 781-800
Education as a Fundamental Right 320
Reverse Discrimination 795-98

ESTATES
Mortmain Laws: Applicability to Trusts 740-44

ETHICS
Public Officials and Conflict of Interest 119-56

EVIDENCE
Confessions 680-82
"Other Crimes" of the Accused 683-85
Photographs Depicting Victims of a Crime 682-83
State of the Art Evidence
Burden of Proof 811-13
Mississippi Position 813-22
Statements Made by Co-Conspirators 687-88
Qualification of Experts 686-87

FAMILY LAW
See **Divorce and Separation; Domestic Relations**

FRAUD
Civil RICO and Predicate Acts 583-86, 621

GOVERNMENT
Collective Bargaining 384-85
Delegation Doctrine and Public Sector Collective Bargaining 385-87, 390-92
Public Employee Anti-Strike Statute 396-99
Public Sector Collective Bargaining 382-84
Sovereign Immunity
Liability in Tort - Federal 837-44
Tort Liability of Government Contractors 833-60
Sovereignty Doctrine and Public Sector Collective Bargaining 385-86, 388-89
Ultra Vires Doctrine 394-96

HEARING
Extradition of Persons from a Nation 532-42
Procedures for the Involuntary Departure of Person from a Nation 522-32

IMMIGRATION
Principles of Nationalities 452-55
Right to Enter "Home" Country 455-67
Treatment of Nationals 467-97

INDICTMENTS
Proper form of 714-715

INDUSTRY
Mississippi Constitution Versus Industry 12-13

INJUNCTION
Appeal of Substantive Issues from 274-78

INSTRUCTIONS
Mississippi Decisions Concerning Instructions to the Jury 695-99

INSURANCE
Uninsured Motorist Coverage 733-34

INTELLECTUAL PROPERTY
Civil RICO Remedies for Infringement 611-19

INTERNATIONAL LAW
Aliens and the Right to Travel 455-67
Emigration 497-512
Extradition 532-42
Involuntary Departure from Nation 522-32
National Citizens and the Right to Re-enter 467-97

JUDICIAL REVIEW
Of Preliminary Injunction 274-78

JURY INSTRUCTIONS
See **Instructions**

LABOR LAW
Collective Bargaining 384-85
Constitutional Right to Organize and Join Unions 383
Need for Collectiveness 380-81

Objections to Public Sector Collective Bargaining
Delegation Doctrine 385-87, 390-92
Sovereignty Doctrine 385-86, 388-89
Public Employee Anti-Strike Statute
Constitutionality 397-98
Duty of Loyalty 397
Generally 396-99
Public Sector Collective Bargaining
In Mississippi 392-99
Statutory Provision, lack of 393
Ultra Vires Doctrine 394-96
Validity of Agreements 394
Role of Private Sector Collective Bargaining 381-82

LEGISLATURE
Classification of Persons, Places, or Things in Mississippi Legislation 334-46
Conflicts Between General and Local Laws 347-49
Curative Laws and Local Officials 346-47
Geographical Classifications in Mississippi Laws 341-43
Mississippi Constitutional Restrictions Upon Special and Local Legislation 328-32
Mississippi Definitions of General Law, Local Law, and Special Law 332-34
Mississippi Election Code of 1986 535-66
Mississippi Laws Concerning a Particular Person or Governmental Unit 343-46
Mississippi Laws Concerning a Portion of the Population 338-41
Problems with Bicameralism 161-63
Reasons Behind a Bicameral State Legislature 160-61
Reasons for Federal Bicameralism 157-59
Special, Local, and General Laws in Mississippi 327-50
Validity of Mississippi Laws Designating a Particular Class 326-38

MASTER AND SERVANT
Constitutional Right to Organize and Join Unions 383
Public Employee Anti-Strike Statute
Constitutionality 397-98
Duty of Loyalty 397
Generally 396-99

MISSISSIPPI CONSTITUTIONAL LAW
Constitutional Revision
Amendment or Total Revision by Legislature 28-33
Appointive Commission 26-28
Constitutional Conventions or Commissions 55-67

Constitutionality of Total Revision by Legislature 30-33
Direct Popular Action under 1890 Constitution, Section 6 48-55
Impact of Voting Rights Act on Revisions 20-26
Overview of State Constitutional Reform 18-20
Proposed Change from Bicameralism to Unicameralism 157-63
Proposed Revision of Mississippi Bill of Rights 114-18
Proposed Revisions of Section 109 ..... 138-47, 149-56
Recent Calls for a New Constitution 13-15
Voter Initiative and Referendum 33-55
History
Early Views on the 1890 Mississippi Constitution 3-4
Origin and Basis of Mississippi's Four Constitutions 3-13
Reasons for Federal Bicameralism 157-59
Judicial Interpretation of Section 109 ..... 123-29, 133-38
Interpretation of Bill of Rights in Mississippi Constitution of 1890
Section 5 81-82
Section 6 82-83
Section 7 83-84
Section 8 84
Section 9 84-85
Section 10 86-87
Section 11 87
Section 12 87-88
Section 13 88-90
Section 14 90-92
Section 15 92-93
Section 16 93-94
Section 17 94-95
Section 18 96-97
Section 19 97
Section 20 97-98
Section 21 98
Section 22 98-100
Section 23 100-01
Section 24 101-04
Section 25 104-05
Section 26 105-08
Section 27 108-09
Section 28 109-10
Section 29 110-11
Section 30 111-12
Section 31 112-13
Section 32 113-14
Legislation on Conflict of Interest for Public Officials 129-33, 139-47, 149-56
Purpose of State Bill of Rights 74-80

MISSISSIPPI RULES OF CIVIL PROCEDURE
See **Civil Procedure**

MISSISSIPPI RULES OF EVIDENCE
See **Evidence**

NAVIGABLE WATERS
Seaman Status
"Balancing" or "Policy Consideration" Approach 376-77
Contributions to Function of the Vessel Test 371-74
Fifth Circuit Test 363-65
"Member of a Crew" Test 358-59
"Permanency" and "Substantial Work" Requirement 367-71
Robinson Test 374-78
Three Factor Test 360-62
"Vessel Engaged in Navigation" Test 359-60
Workers on Special Purpose Structures 365-67

NEGLIGENCE
Contributory
Passenger in Intoxicated Driver's Car 774-76
Government Contractors 833-37
Per se
Adult, Voluntary Inebriation 772-74

ORGANIZED CRIME
Task Force Definition 571

PATENTS AND COPYRIGHTS
Civil RICO and Infringment 611-19

PLEADING
Civil RICO Plaintiff and Degree of Specificity 605-07

PRODUCTS LIABILITY
Design Defect Actions Under Section 402A 822-30
Government Contractor Defense 833-61
Liability of Manufacturers Under Section 402A 801-31
State of the Art Evidence
Burden of Proof 811-13
Mississippi Position 813-22

PROPERTY
Due-on-Sales Clauses 757-59
Homeowners Associations
Expansion of Powers 753-57

Mandatory Membership 755-57
Measurement of Damages Caused by Waste 759-61
Public Trust Lands 747-52

PUBLIC OFFICERS
Bicameral Legislature Effect On Lieutenant Governor's Power 162
Conflict of Interest 119-56
Property Qualifications in the 1817 Mississippi Constitution 6
Religious Tests in the 1817 Mississippi Constitution 6

RACKETEERING
Civil RICO 567-638

RELIGIONS
Religious Tests in the 1817 Mississippi Constitution 6

REMEDIES
Civil RICO Plaintiff 598-600
Scope of Remedies for Copyright Infringement 624-30

SEARCH AND SEIZURE
See **Constitutional Law; Criminal Law; Criminal Procedure**

STANDING
Civil RICO Plaintiffs 591-92

STATUTE OF LIMITATIONS
Civil RICO Cases 603-04
Workmen's Compensation Benefits 649-50

STATUTES
Comparison of Mississippi Business Corporations Act with Revised Model Business Corporations Act 171-241

TORTS
See **Products Liability**
Contributory Negligence
Passenger in Intoxicated Driver's Car 774-76
Invasion of Privacy 776-78
Negligence Per Se
Adult, Voluntary Inebriation 772-74
Strict Liability in Tort 765-72

TRADEMARKS
Civil RICO and Trademark Infringment 630-36

TRIALS
Closure of Pretrial Hearing to Protect Trial From Prejudicial Publicity 422-24
Compelling Governmental Interest Required to Close Criminal Trial 426-27
Right to Fair Trial Defeated by Prejudicial Publicity 420-21
Right to Fair Trial Injured by Public Court Proceedings 418-19
Public Criminal Trial Guaranteed Absent Overriding Interest 424-25

TRUSTS
Mortmain Laws 740-44

UNIFORM COMMERCIAL CODE
Article 2
Automobile Sales 673-75
Equipment Leases 670-73
Article 9
Impairment of Collateral Securing Promissory Note 668-70

VENUE
Change of 709-13

VOTING
Attempts to Constitutionally Disenfranchise Blacks 10
Mississippi Election Law Reform 535-66
Poll Tax and Literacy Tests 11

WILLS
Mortmain Laws: Applicability to Trusts 740-44

WITNESSES
Chiropractor's Status as an Expert Witness 730-33

WORKMEN'S COMPENSATION
Choice of Law 647-48
Development of Longshoremen and Harborworkers' Compensation Act
Distinction Between Land-Based Workers and Seamen 357
Provision for Uniform Federal Compensation 357-58
State Legislation 355-56
Expert Witnesses 650-51
"Found Dead" Presumption 644-47
"Going and Coming" Rule 648-49
Statute of Limitations 649-50
Statutory Penalty for Nonpayment of Benefits 651

ZONING
Based on Esthetic Interest 406-07
Narrowly Tailored Content-Neutral Time, Place and Manner Zoning Ordinance as Valid 401-04, 412-16
Nuisance Ordinance Applied to Adult Theatre 407-08
Of Nude Dancing 410
Regulating the Location of Adult Theatres 408-09

ARTICLES

By Authors

JOHN G. CORLEW
Section 109: Dilemma of the Public Official — and the Public 119

EMMETTE F. HALE, III
Civil RICO and Intellectual Property After *Sedima* 567

JOHN C. HENEGAN and R. ANDREW TAGGART
The Mississippi Election Code of 1986: An Overview 535

WENDELL H. HOLMES
The Revised Model Business Corporation Act and Corporate Law Reform in Mississippi, Part One 165

JAMES J. KNICELY
The *Thornburgh* and *Bowers* Cases: Consequences for *Roe v. Wade* 267

JEROME FONTAINE LEAVELL
Robert Joseph Farley: A Memorial 243

LUTHER T. MUNFORD and E. MARCUS WIGGS, III
Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond 73

PAUL M. NEVILLE
The Equal Protection Clause and the Erosion of the Theoretical Foundations of Bicameralism 157

DAVID G. SANSING
Mississippi's Four Constitutions 3

LESLIE H. SOUTHWICK and C. VICTOR WELSH, III
Methods of Constitutional Revision: Which Way Mississippi? 17

R. ANDREW TAGGART and JOHN C. HENEGAN
The Mississippi Election Code of 1986: An Overview 535

C. VICTOR WELSH, III and LESLIE H. SOUTHWICK
Methods of Constitutional Revision: Which Way Mississippi? 17

SIEGFRIED WIESNER
Blessed Be the Ties that Bind: The Nexus Between Nationality and Territory 447

E. MARCUS WIGGS, III and LUTHER T. MUNFORD
Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond 73

ARTICLES

By Title

Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory ..... *Siegfried Wiessner* 447

Civil RICO and Intellectual Property After *Sedima Emmett F. Hale, III* 567

Commentary on the Bill of Rights in the Mississippi Constitution of 1890 and Beyond .. *Luther T. Munford and E. Marcus Wiggs, III* 73

The Equal Protection Clause and the Erosion of the Theoretical Foundations of Bicameralism ..... *Paul M. Neville* 157

Methods of Constitutional Revision: Which Way Mississippi? ..... *Leslie H. Southwick and C. Victor Welsh, III* 17

The Mississippi Election Code of 1986: An Overview ..... *R. Andrew Taggart and John C. Henegan* 535

Mississippi's Four Constitutions ..... *David G. Sansing* 3

Robert Joseph Farley: A Memorial ..... *Jerome Fontaine Leavell* 243

Section 109: Dilemma of the Public Official - and the Public ..... *John G. Corlew* 119

The Revised Model Corporation Act and Corporate Law Reform In Mississippi: Part One ..... *Wendell H. Holmes* 165

The *Thornburgh* and *Bowers* Cases: Consequences for *Roe v. Wade* ..... *James J. Knicely* 267

COMMENTS

General, Special, Local and Private Legislation: A Mississippi Overview. ..... O. *Kendall Moore* 327

The Government Contractor Defense: An Analysis of Its Application by the Courts ..... *T. Kenneth Griffis, Jr.* 833

Public Sector Collective Bargaining in Mississippi: An Argument for Acceptance ..... *Richard Compere* 379

Reexamination of the *Robinson* Test for Seaman Status ..... *Virginia Carothers* 351

Relevance of State of the Art Evidence in Design Defect Actions Under *Toliver v. General Motors Corp:* A Portent of More Absolute Liability for Defendants in Mississippi ..... *Marian Alexander* 801

1986 MISSISSIPPI SUPREME COURT REVIEW

Administrative Law ..... *Dianne S. Riley* 641
Civil Procedure ..... *Pamela Wescovich-Roberts* 654
Contracts and Commercial Law ..... *C. Lee Cagle* 667
Criminal Law .....
Jeffrey Peters, Christopher Solop, and Brenda Kay Tanner 677
Miscellaneous ..... *Noel Victoria Holladay* 723
Property ..... *Lewis W. Bell* 745
Torts ..... *John T. Sparks* 763

RECENT DECISIONS

CONSTITUTIONAL LAW
First Amendment — Cities May Restrict Location of Adult Theatres Through Narrowly Tailored, Content-Neutral, Time, Place and Manner Restrictions ..... *Jim Bobo* 401
Right of Access to Criminal Proceedings — Qualified First Amendment Right of Access Attaches to Pretrial Hearings Absent Overriding Interest Protected Only by Closure .....
..... *Gram Meadors* 417
Right to Travel — When a State Statute Creates a Fixed-Date Residency Requirement, the Statute Must Withstand Strict Equal Protection Scrutiny ..... *Stuart G. Kruger* 431

TABLE OF CASES

Cases in Italics are the Subject of a Recent Decision

A

Abood v. Detroit Bd. of Educ. 385, 387
Adoption of Baby Boy "B", *In re* 724
Agent Orange Prod. Liab. Litig., *In re* 834, 847-49
Albright v. Albright 727-28
Alcorn v. Hamer 48, 52
Allgeyer v. Louisiana 297
American Nat'l Bank and Trust Co. of Chicago v. Haroco, Inc. 568-69, 90-92, 95-96, 607
Anders v. California 18-19, 106
Anderson Fed'n of Teachers v. School City of Anderson 388-89
Aptheker v. United States .. 479, 502
Atlantic Transp. Co. v. Imbrovek 356
Attorney General of New York v. Soto-Lopez 431-46

B

Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co. 605-06
Baker v. Ford Motor Co. 817-19
Balzac v. Porto Rico 476
Banking Co. Liquidating Corp. v. Colvard 94
Barker v. Lull Eng'g Co. 811
Barrett v. Chevron U.S.A., Inc. . 352
Barrett v. Chevron U.S.A., Inc. (Barrett II) 352, 375-78
Bastian v. Wausau Homes, Inc. 809-10
Beall v. Board of Supervisors ... 347
Beavers v. State 43-44
Beck v. Allen 40
Bell v. First Columbus Nat'l Bank 777-79
Benoit Elevator Co. v. Mitchell 649-50
Bertrand v. International Mooring & Marine, Inc. 368-69
Bethlehem Steel Co. v. Payne .. 648
Blonder-Tongue Laboratories v. University of Ill. Found. 623
Board of Educ. v. State Educ. Fin. Comm'n 337-38
Boatland of Houston, Inc. v. Bailey 805
Bowen v. American Hosp. Ass'n 291-92
Bowers v. Hardwick .. 270-73, 317-21
Boyd v. Applewhite 190
Boydstun v. State 90
Braniff v. Jackson Ave.-Gretna Ferry, Inc. 368
Braxton v. State 696
Brown, *In re* 114
Brown v. Board of Educ. 282
Brown v. Illinois 681
Bruce v. Martin-Marietta Corp. 804-07
Brumfield v. Mississippi State Bar Ass'n. 642-43
Brunet v. Boh Bros. Constr. Co. 367
Bryant, Inc. v. Walters 660-63
Burt, *In re* 528-29
Burt v. State 700-01
Butler v. Whiteman 362-63

C

Cabaniss v. Hipsley 778

Cabello v. State 680, 709-10
Candebat v. Flanagan 776-78
Carey v. Population Servs. Int'l. 301-02, 309
Carolina Transfer Co. v. Anderson 182
Carter v. Berger 592-93
Carter v. State 698-99
Carter v. State Mut. Fed. Sav. & Loan Ass'n 668
Carumbo v. Cape Cod S.S. Co. 360-63, 371
Cassibry v. State 119, 127-29
Challoner v. Day & Zimmerman 836
Chapman v. Hanson Scale Co. 646-47
Charlton v. Kelly 527
Chelentis v. Luckenbach S.S. Co. 354-55
Chrismond v. Chrismond 739
Cinque Bambini v. State of Mississippi 747-52
City Council of Los Angeles v. Taxpayers for Vincent 411-12
City of Akron v. Akron Center for Reproductive Health ... 286, 290-91
City of Renton v. Playtime Theaters, Inc. 401-16
Clark v. State 339
Coca-Cola Bottling Co. v. Reeves 765-72
Colautti v. Franklin 295-96
Cole v. State 707
Coleman v. State 690-91
Connor v. Johnson 160
Coulter v. Texaco, Inc. 374
Cox v. New Hampshire 405
Cranson v. International Business Machs. Corp. 181
Crook v. Commercial Nat'l Bank 741-43
Cuevas v. Royal D'Iberville Hotel 772-74
Culley v. Pearl River Indus. Comm'n 341-42

D

Dart v. Wiebe Mfg., Inc. 826
Day v. Barber-Coleman Co. 803
Dean Witter Reynolds v. Byrd 608
Delaware v. Prouse 709
Delta & Pine Land Co. v. Board of Supervisors of Bolivar County 342-43
Desper v. Starved Rock Ferry Co. 360
DeWeese Nelson Realty, Inc. v. Equity Serv. Co. 746
Dorsey v. Smith 137
Dove v. Belcher Oil Co. 373-74
Dowling v. United States 612-15, 630
Drane v. State 708

E

Early-Gary, Inc. v. Walters 817
Edwards v. Bridgetown Community Ass'n, Inc. 820
Edwards v. Sears, Roebuck & Co. 394-95
Edwards Hotel & City R.R. Co. v. Jackson 394-95
Eisenstadt v. Baird 301-02, 309
Ergon, Inc. v. Dean 177
Erznoznik v. City of Jacksonville 407-08
Estate of Hardin, *In re* 181
Euclid v. Ambler Realty Co. 404
Evans v. State 681-82

F

Fairfield v. American Photocopy Equip. Co. 778
Falstaff Brewing Corp. v. Williams 815
Fanning v. State 701
Feres v. United States 840-41
Ferguson v. Watkins 89

Fincher v. Ford Motor Co. . . . 821-22
Firefighters v. Stotts 276
Fisher v. State 107
Flanagan v. Jackson Wholesale Bldg. Supply Co. 182-83
Fondren v. State Tax Comm'n . . . 82
Fong Yue Ting v. United States 462, 517
Ford Motor Co. v. B & H Supply, Inc. 629-30
Ford Motor Co. v. Cockrell . . . 818-19
Ford Motor Co. v. Matthews . 816-17
Foster v. State 686, 717-19
Francis v. United Jersey Bank . . 201
Franks v. Bowman Transp. Co. . 789
Frazier & Knox v. Mississippi 134-35
French Drug Co. v. Jones 91
Friedhof v. City of Biloxi 125
Fullilove v. Klutnick 789-90

G

Gannett Co. v. DePasquale . . . 422-24
Garrison v. Louisiana 90
Garvis v. State 706-07
Gates v. State 715-16
Gatewood v. Matthews 50-51
General Motors Corp. v. Edwards 808
Gibbs v. Bass 650
Gilchrist Mach. Co. v. Ross . . 657-58
Giles v. City of Biloxi 344
Gill v. State 705
Gilmore v. Luther McGill, Inc. . 655
Gitlow v. New York 404
Globe Newspaper Co. v. Superior Court 107-08, 425-26
Golding v. Salter 124
Gonzales v. Williams 476
Gottsein v. Lister 41
Graham v. Slaughter 588
Gray v. Gray 735-36
Green v. Weller 51-52
Greenman v. Yuba Power Prod., Inc. 807-10
Griffin v. State 684
Grimes v. Raymond Concrete Pile Co. 361-63
Griswold v. Connecticut 287, 301-02, 309
Guidry v. Continental Oil Co. . . 368

H

Haig v. Agee 503-05
Harisiades v. Scaughnessy 517
Harris v. Harrison County Bd. of Supervisors 345-46, 350
Heffron v. International Sec'y for Krishna Consciousness, Inc. 410-11
Hemingway v. State 679
Henry v. State 686-87
Hill v. Dunaway 775-76
Hohlenkamp v. Rheem Mfg. Co. 807, 825-26
Holmes v. State 697
Home Tel. Co. v. Darley 189
Hughes v. Tyler 668-70

I

Illinois Brick Co. v. Illinois . . . 592-93
In re: See **proper name**
International Stevedoring Co. v. Haverty 357-58
Irving v. State 722

J

J.L. Teel Co. v. Houston United Sales, Inc. 670-73
Jackson Redevelopment Auth. v. King, Inc. 126, 339-41
Jacobson v. Massachussetts . . . 296-97
Johnson v. Board of Trustees . 740-44
Johnson v. John F. Beasley Constr. Co. 372
Johnson v. Noble Drilling Co. . . 370

Johnson v. Santa Clara County . 792
Johnson v. State 107
Jones v. Knight 92

K

Kavanaugh v. Carraway 728
Kawakita v. United States 449
Kent v. Dulles 457
Kilgore v. Barnes 664-66
Killingsworth v. State 106
King v. State 716
Kinzey v. State 721-22
Knox Glass Bottle Co. v. Underwood 205-06

L

Landstreet v. Meyer 189
Laney v. State 705
Larsen v. General Motors Corp. 804, 13
Lear v. Adkins 623
Lee v. State 706-08
Lehrmann v. Cohen 183
Lightsey v. State 720
Local 52, Int'l Ass'n of Firefighters v. City of Meridian 395-96
Local 28 Sheet Metal Workers v. EEOC 791
Logan v. Mississippi 135-37
Lombard v. Lombard 40
Longmire v. Sea Drilling Corp. . 371
Lovorn v. Hathorn 343

M

M & J Oil Co. v. Wilson 651
Marriage of Ditto, *In re* 726
Mason v. Caterpillar Tractor Co. 828
Mayor v. State 52-54
McCray v. State 687-88
McDaniel v. State 695-96
McKay v. Rockwell Int'l Corp. 834, 850-52
McKenzie v. Boykin 53-54
McLish v. Roth 274
McMullen v. State 124
Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co. 845-46
Methodist Hosp. v. Slack 742-43
Mhoon v. State 106
Miles v. Board of Supervisors .. 102
Miller v. Tucker 124, 347
Mississippi College v. May 742
Mississippi Farm Bureau Mut. Ins. Co. v. Garrett 730-34
Mississippi State Bar v. Nixon 643-44
Mississippi State Bar Ass'n v. Strickland 656
Mississippi State Highway Comm'n v. Franklin County Timber Co., Inc. 745
Mitchell v. State 687-88
Morgan v. Bank of Waukegan .. 589
Mozingo v. Correct Mfg. Corp. 816, 821
Munford, Inc. v. Peterson 772-73

N

NAACP v. Hampton County Election Comm'n. 21
Naron v. Prestage 551-52
Naveda v. Ahumada 736
Nebraska Press Ass'n v. Stuart . 422
Newport News Fire Fighters Ass'n Local 795 v. City of Newport News 386
Nishimura v. United States 462
NLRB v. Jones & Laughlin Steel Corp. 380
Noble Drilling Corp. v. Smith .. 370
Norris v. State 695-96
Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc. 587-88
Norton v. Warner Co. 359-60, 362, 375

Noxubee County Hardware Co. v. City of Macon 123, 138

O

O'Brien v. Muskin Corp. 811-12
Odom v. State 691-92, 702
Offshore Co. v. Robison 351-53, 363-78
Ohio v. Roberts 681
Ohio Contractors Ass'n v. Keip . 794
Oliver, *In re* 419-20
Olson v. Flinn 734-37
Owens v. Whitwell 663-64

P

Page v. State 106
Paris Adult Theatre I. v. Slanton 406-07
Parker v. State 678-79
Patton v. Yount 107
Paymaster Oil Mill Co. v. Mitchell 675, 769
Penick v. State 100
Perkins v. State 690
Perry v. Bridgetown Community Ass'n, Inc. 752-55
Peyton v. Pascagoula Drayage Co. 659
Phillips v. State 697-98
Pickens v. Pickens 738-40
Planned Parenthood Ass'n v. Ashcroft 297
Planned Parenthood of Cent. Mo. v. Danforth 284, 294
Portnoy v. Cessna Aircraft Co. ... 821
Power v. Ratliff 38
Power v. Robertson 38-41, 43-47
Powers v. Bethlehem Steel Corp. 365-367
Press-Enterprise Co. v. Superior Court of Cal. 417-30
Pressley v. State 110
Pridgett v. Jackson Iron and Metal Co. 819-20
Pruett v. City of Rosedale ... 92, 389
Pryor v. Lowe 32

Q

R

Regan v. Wald 703
Regents of the Univ. of Cal. v. Bakke 789
Reichelt v. Johns-Manville Corp. 807
Religious Technology Center v. Wollersheim 599
Rester v. Morrow 673-75
Richmond Newspapers, Inc. v. Virginia 419, 424-25
Road Maintenance Supply v. Maxwell 644-45
Robertson v. Levy 181
Roe v. Wade 267-323
Rolph v. Board of Trustees . 345, 350
Rummel v. Estelle 699
Ryan v. Feeny & Sheehan Bldg. Co. 835

S

Salgado v. M.J. Rudolph Corp. 366-67
Sam Shainberg Co. of Jackson v. Barlow 768, 819
San Antonio School Dist. v. Rodriguez 320
Sanner v. Ford Motor Co. 846-47
Saxton v. Rose 776
Schacht v. Brown 597
Schad v. Borough of Mount Ephraim 410
Schneckloth v. Bustamonte 100
Scott v. Sandford 304-05
Seales v. State 670-71

Sedima, S.P.R.L. v. Imrex Co. ... 568-70, 81-83, 86-88, 91-92, 95, 601-02, 14, 36-38
Senko v. LaCrosse Dredging Corp. ... 361, 363
Shaw v. Grumman Aerospace Corp. ... 834, 54-56
Shearson/American Express, Inc. v. McMahon ... 607-08
Sheppard v. Maxwell ... 420-21
Shows v. Watkins ... 745
Singleton v. State ... 702
Sisson v. State ... 703
Smith v. Arkansas State Highway Employees Local 1315 ... 383
Smith v. State ... 720
Smith v. Transcontinental Gas Pipeline Corp. ... 335, 350
Smith v. Van Gorkom ... 200
Smith v. Vulcan Iron Works ... 275, 277
Solem v. Helm ... 109-10, 699
Sonford Prod. Corp. v. Freels ... 651
South Chicago Coal & Dock Co. v. Bassett ... 358-59, 361
Southern Pac. Co. v. Jensen ... 356
Spain v. Holland ... 726-30
Spradlin v. Smith ... 655
Sproule v. Fredericks ... 61-62, 64-65
Stanley v. Georgia ... 406
State v. Caldwell ... 81-82, 710-11
State v. Clawson ... 683
State v. J.J. Newman Lumber Co. ...
State v. Manley ... 31
State v. McClinton ... 124-25
State v. McPhail ... 85
State v. Ratliff ... 53
State *ex rel.* Adams v. Herried ... 42-43
State *ex rel.* Collins v. Jones ... 41-45, 49, 51, 66
State *ex rel.* Howie v. Brantley ... 36-41, 43
State *ex rel.* Jordan v. Gilmer Grocery Co. ... 337
State *ex rel.* Knox v. Speakes ... 333
State *ex rel.* McClurg v. Powell ... 41-43
State *ex rel.* Stirling v. Board of Levee Comm'rs ... 124
State Stove Mfg. Co. v. Hodges ... 766, 802, 814-15, 818, 823
Steelworkers v. Webber ... 789-90
Stencel Aero Eng'g Corp. v. United States ... 841-44
Stokes v. State ... 704
Strickland v. Washington ... 689-90
Stringer v. State ... 101
Sugarman v. Dougall ... 449
Sutkowsky v. Universal Marion Corp. ... 827-28

T

Talley v. California ... 563-65
Tatum v. Wheeless ... 83
Taylor v. State ... 86
Texas v. White ... 84
The Osceola ... 354
Thomas v. Munson Mach. Co. ... 820-21
Thompson v. State ... 685-86
Thornburgh v. American College of Obstetricians and Gynecologists ... 270-323
Toliver v. General Motors Corp. ... 801-31
Toombs v. Sharkey ... 333, 336-37
Trak Microcomputer Corp. v. Wearne Bros. ... 587-88
Tucker v. Tucker ... 728
Turner v. Haynes ... 659-60
Turner v. Turner ... 727

U

Unifirst Fed. Sav. & Loan Ass'n v. Tower Loan of Mississippi, Inc. ... 757-59
Union Supply Co. v. Pust ... 829
United States v. Bledsoe ... 579

United States v. Ju Toy 476, 516-17
United States v. Laub 478
United States v. Leon 101
United States v. Mississippi Valley Generating Co. 139-40
United States v. O'Brien 280-81, 411
United States v. Shearer 843
United States v. Turkette 578-80
United States v. United Mine Workers of America 385
United States v. Wheeler 477

V

Valentine v. United States 527-28
Validation of $15,000,000 Hosp. Revenue Bonds, *In re* 331-32, 348
Validation of $7,800,000 Combined Util. Sys. Revenue Bonds, *In re* 331-32, 348-350
Viltz v. Viltz 726-27

W

Wallace v. Oceaneering Int'l 376-77
Walters v. Blackledge 103-04
Walton v. Chrysler Motor Corp. 813, 19, 30
Warren County Bd. of Educ. v. Wilkinson 652-53
Washington v. Greenville Mfg. & Mach. Works 645
Washington v. W.C. Dawson & Co. 357
Watts v. State 678
Weaver v. State 704
West Virginia v. Barnette 303
West v. Johnson & Johnson Prod., Inc. 806
White v. Malone Properties, Inc. 647-48
White v. State 711-12
Williams v. State 697
Wilson v. Garcia 604
Wilson v. Service Broadcasters, Inc. 648-49
Wilson v. Stocker 563-64
Worthy v. United States 477
Wygant v. Jackson Bd. of Educ. 791

Y

Yearsley v. Ross Constr. Co. 844
Yicks Wo v. Hopkins 517
Young v. American Mini Theatres, Inc. 408-09
Youngstown Sheet & Tube Co. v. Sawyer 274-77

Z

Zemel v. Rusk 502

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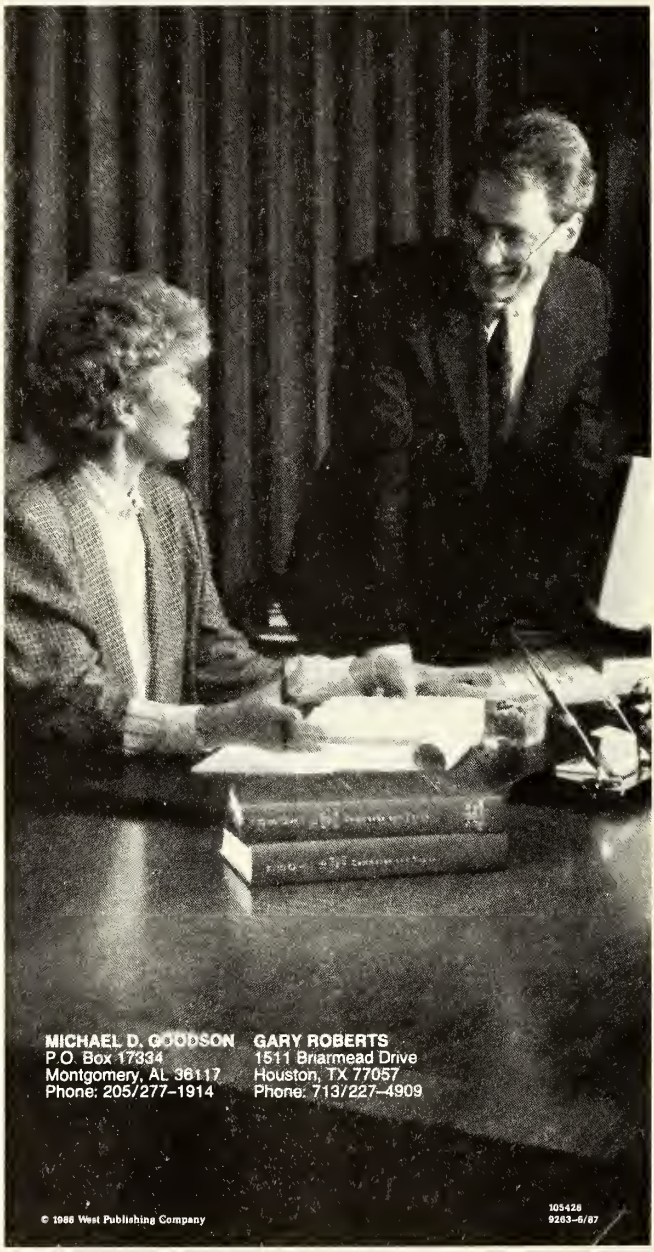

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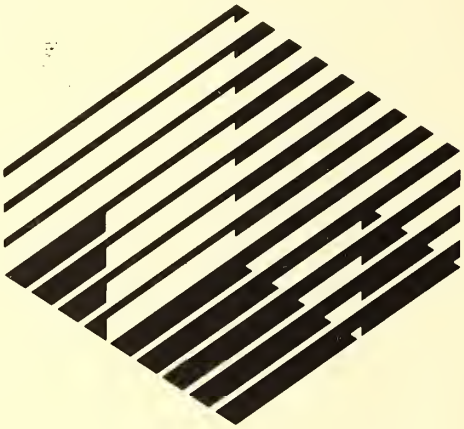

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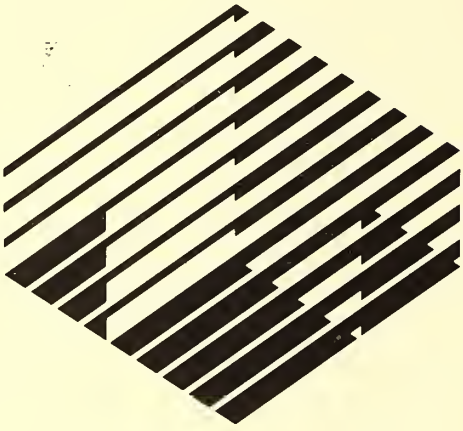

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